Supreme Court of the United States,

OCTOBER TERM, 1903.

ALBERT J. ADAMS,
Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

No. 504.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case comes before this Court on writ of error to the Supreme Court of the State of New York, to review a judgment of conviction against the plaintiff in error (the defendant below) entered upon an order of the Court of Appeals of that State, affirming a judgment of the Appellate Division of the Supreme Court, in the First Department, of that State, affirming a judgment entered upon a verdict rendered upon a trial before the Supreme Court, finding him guilty of *knowingly having in his possession a writing, paper and document representing and being a record of chance, share and interest in numbers sold in what is commonly called policy, and of having in his possession papers and devices such as are commonly used in carrying on*

and playing that game in violation of Section 344a of the Penal Code of the State of New York.

See Indictment, pages 2 and 3.
" Extract of Minutes, page 5.
" Judgment of Affirmance, page 109.
" Order on Remittitur, pages 119-120.
" Petition for Writ of Error, pages 122-123.
" Writ of Error, pages 126-127.

Indictment.

The indictment contains two counts, and charges as follows:

" The Grand Jury of the County of New " York, by this indictment, accuse Albert J. " Adams of the crime of knowingly having " in his possession a writing, paper and docu- " ment representing and being a record of " chance, share and interest in numbers sold " in what is commonly called policy, com- " mitted as follows:

" The said Albert J. Adams, late of the " Twentieth Ward of the Borough of Man- " hattan, of the City of New York, in the " County of New York aforesaid, on the 12th " day of December, in the year of our Lord " one thousand nine hundred and one, at the " ward, borough and county aforesaid, felo- " niously *did knowingly have in his posses- " sion a certain writing, paper and docu- " ment representing and being a record of a " chance, share and interest in numbers sold " in what is commonly called policy*, which " said writing, paper and document is as fol- " lows, that is to say: Manifold books and " sheets, being records of numbers sold and " lottery policies sold, commonly known as

" a manifold book, a more particular descrip-
" tion whereof is to the Grand Jury afore-
" said unknown, and cannot now be given,
" against the form of the statute in such
" cases made and provided and against the
" peace of the People of the State of New
" York and their dignity.

" SECOND COUNT.

" And the Grand Jury aforesaid, by this
" indictment, further accuse the said Albert
" J. Adams of the crime of knowingly hav-
" ing in his possession a paper, writing, print,
" numbers, device, policy slip and articles of
" a kind such as is commonly used in carry-
" ing on, promoting and playing the game
" commonly called policy, committed as fol-
" lows:

" The said Albert J. Adams, late of the
" ward, borough and county aforesaid, after-
" wards, to wit, on the day and in the year
" aforesaid, at the ward, borough and county
" aforesaid, feloniously *did knowingly have*
" *in his possession a paper, print, writing,*
" *numbers, device, policy slip and articles of*
" *a kind such as is commonly used in carry-*
" *ing on, promoting and playing the game*
" *commonly called policy,* which said paper,
" print, writing, numbers, device, policy slip
" and articles aforesaid is as follows: Mani-
" fold books and sheets, being records of num-
" bers sold and lottery policies sold, and com-
" monly called manifold books, policy slips,
" and being numbers alleged to have been
" drawn, and policy lists, being alleged rec-
" ords of alleged drawings, a more particular
" description whereof is to the Grand Jury
" aforesaid unknown, and cannot now be
" given, and against the form of the statute
" in such case made and provided, and against

" the peace of the People of the State of New " York and their dignity."

See Indictment, pages 2 and 3.

To this indictment the defendant entered a plea of " Not guilty."

See Plea, page 4.

By order of the Supreme Court, the indictment was removed from the Court of General Sessions into the Supreme Court for trial.

See Order of Removal, page 4.

The Statutes.

The provisions of the Penal Code under which the indictment was found and the conviction was had are as follows:

" 344a, KEEPING PLACE FOR PLAYING POL- " ICY, ETC. A person who keeps, occupies or " uses, or permits to be kept, occupied or " used, a place, building, room, table, es- " tablishment or apparatus for policy playing, " or for the sale of what are commonly " called 'lottery policies,' or who delivers " or receives money or other valuable con- " siderations in playing policy, or aiding " in the playing thereof, or for what is " commonly called a 'lottery policy,' or " any writing, paper or document, in the " nature of a bet, wager or insurance upon " the drawing or drawn numbers of any " public or private lottery, *or who shall have* " *in his possession knowingly any writing,* " *paper or document, representing or being* " *a record of any chance, share or interest* " *in numbers sold, drawn, or to be drawn,* " *or in what is commonly called 'policy,'* or

" in the nature of a bet, wager or insurance " upon the drawing or drawn numbers of " any public or private lottery, *or any* " *paper, print, writing, device, policy slip or* " *article of any kind, such as is commonly* " *used in carrying on, promoting or playing* " *the game commonly called policy*, or who " is the owner, agent, superintendent, janitor " or caretaker of any place, building or room " where policy playing, or the sale of what " are commonly called 'lottery policies,' is " carried on with his knowledge, or after " notification that the premises are so used, " permits such use to be continued, or who " aids, assists, or abets in any manner in " any of the offenses, acts or matters herein " named, *is a common gambler and punish-* " *able by imprisonment for not more than two* " *years, and in the discretion of the Court by* " *a fine not exceeding one thousand, or both.*"

See Penal Code, Section 344a.

" Section 344b. POSSESSING POLICY SLIPS, " ETC. The possession by any person, *other* " *than a public officer*, of any writing, paper " or document representing or being a record " of any chance, share or interest in num- " bers sold, drawn or to be drawn, or in " what is commonly called policy, or in the " nature of a bet, wager or insurance upon " the drawing or drawn numbers of any pub- " lic or private lottery, or any paper, print, " writing, numbers or device, policy slip, or " article of any kind, such as is commonly " used in the carrying on, promoting or play- " ing the game commonly called policy, *is* " *presumptive evidence of possession thereof,* " *knowingly and in violation of the provi-* " *sions of Section 344a.*"

See Penal Code, Section 344b.

Facts.

On December 12, 1901, Chief County Detective, George P. Hammond, of the District Attorney's office, and a Detective Sergeant by the name of Rhinders, made a raid on a real estate office occupied by the firm of Pocher & Company, at No. 40 West 34th Street, in the City of New York. In the rear part of the premises raided was a room with a glass door marked "Mr. Adams." In this room or office, among other things, was a trunk and three tin boxes and an ordinary office desk.

While the raid was on, it is claimed, the defendant entered the office of Pocher & Company and proceeded to the room bearing his name on the door. As he approached, Rhinders took out what he stated was a search warrant, and started to read it, whereupon the defendant said, "I warn you not to "touch anything in this room. There is nothing "here belongs to me." (See Case, page 13.)

Thereupon Chief Detective Hammond picked up a letter-book having the letters "A. J. A." upon it, and said to the defendant, "How about this, "Adams? This has 'A. J. A.' upon it?" to which inquiry the defendant made no reply. (See Case, page 13.)

Hammond then suggested to Rhinders that they better go slow, and that it would be a good idea to get some one to advise them as to the proper method to pursue, and suggested that they go back and see Mr. Frank Moss, or some one who was capable of advising them. This suggestion was adopted, and two police officers, who had accompanied the raiding party, were left in charge of the office.

Hammond and Rhinders, accompanied by the defendant, drove to 366 West 31st Street, and the defendant was turned over to a detective sergeant there in charge.

After consulting with Mr. Frank Moss, the raid-

ing party, which was now composed of Mr. Moss, Captain Goddard, of the Anti-Policy Society, Mr. Shortridge, secretary to District Attorney Philbin, a Mr. Wells, County Detective Hammond and Detective Sergeant Rhinders, returned to Pocher & Company's office, in West 34th Street, and immediately proceeded to search the place.

The trunk, which was in the rear part of the room, was broken open with a short crowbar, and in it was found a number of rolls of paper wrapped in newspaper wrappings, and which, it is claimed, were policy "manifold sheets," besides numerous other papers of a concededly private character.

The papers were returned to the trunk, and the three tin boxes, which were also locked and had to be forced open, were searched and were found to contain papers, some of which, it was claimed, related to the rolls of paper in the newspaper wrappings found in the trunk, and others of which were concededly of a purely private character, relating generally to the business and personal affairs of the defendant. These also were returned to the boxes, and the raiders then proceeded to open the desk. This part of the search was conducted by Mr. Moss personally. In the desk, as in the tin boxes, were some papers and memoranda, which, it was claimed, related to the rolls found in the trunk, but it also contained papers of a purely private and a personal character.

All of the papers found in the desk were taken out and put into a waste-paper basket which stood alongside.

The learned District Attorney has made a digest of the contents of the trunk, the tin boxes and the desk, and it is so complete and comprehensive that we have taken the liberty to incorporate the statement in our brief.

Contents of Trunk.

In the trunk there were found 35 rolls (Exhibit 11, C. E. inc., 141–144 inc., 146, 150–168 inc., 170, 172, 173, 144c, 142d), of which seven were wrapped in newspaper wrappings endorsed in what was claimed to be defendant's handwriting (Exhibits 11a, Ca, Da, 142a, 143a, 144a, 146a; see pages 37–38, 55, 72). There were found there also a number of envelopes claimed to be endorsed in his hand, and containing, either in the endorsement itself or in the contents, reference to matters in which the defendant was said to be interested (Sapphire Exhibit 48, see Exhibit "Z" (page 107).

There was found there also a letter addressed to him (Exhibit G), a number of miscellaneous papers in his handwriting (Exhibits 33, 32, 34, 39, 40, 41, 42; see handwriting testimony, pages 36, 71), and a bill proved to have been rendered to him by the Hotel Savoy (Exhibit M, see page 50).

Contents of Desk.

In the desk were found a number of books, letters and other papers, all of which were offered in evidence by the prosecution. Many of these bore the alleged handwriting of the defendant, and their contents related to affairs in which he was found to have had a business interest. Some of these books and papers contained memoranda said to be in the defendant's handwriting, relating to matters referred to by papers found in the trunk, and some of the books found in the desk contained a schedule of accounts claimed to relate to the policy business, represented by the "policy manifolds" found in the trunk.

People's Exhibits 23, 24, 25, 26, 27, 28, 29 and 30 found in the desk (page 21) were small memorandum books. All of these books were claimed to contain statements and memoranda, all in defendant's handwriting (pages 34 and 71).

Pages 25 and 27 of Exhibits 23, 24, 25, 26, 27 and 28 contain an alleged partial list, in the defendant's alleged handwriting, of the policy shops, the names and number of which appear in the "manifold sheets" found in the trunk, particularly that roll of sheets marked People's Exhibit D (page 64).

One of these books (People's Exhibit 30) bore an endorsement, "Brewery, College Point," said to be in defendant's handwriting (page 34). The People proved that the defendant was a director in the "Karsch Brewing Company," which company had its place of business at College Point, Long Island (page 39, and People's Exhibits "X" and "Y"). Schedules of real estate accounts between the defendant and Pocher & Company were found in this desk (People's Exhibits 6, 7 and 8, page 22). An envelope claimed to be endorsed in defendant's handwriting as follows: "Policy Bill, Herald, January 29, 1900" (page 35), was also found there (People's Exhibit 49, page 23), and in the trunk was found an envelope (People's Exhibit 32, page 16), upon which appeared the words "P. Law," also said to be in defendant's handwriting (page 35). A piece of paper was found in the desk bearing the word "Sapphire" (People's Exhibit 108), and in the trunk was found a communication relating to the Sapphire Match Company, enclosed in an envelope (People's Exhibit 48, page 16). On the envelope was written the word "Sapphire" in defendant's handwriting (page 71), and the People proved that the defendant was a director in the Sapphire Match Company (People's Exhibit "Z," page 39).

Papers bearing the letter-heads of McLain, Simpson & Company were found in the desk (People's Exhibit 181, page 22), while other papers were found in the trunk bearing the words, "McLain, Simpson & Company," written in defendant's handwriting (People's Exhibit 45, pages 72 and 36).

Contents of Tin Boxes.

In these boxes were a number of papers, all of which were offered in evidence by the prosecution, and many of which bore various memoranda in words and figures claimed to be in the handwriting of the defendant. Among the papers found in the boxes were a number of envelopes and letters addressed to "Mr. A. J. Adams" (see People's Exhibits 112, 113, 120, 122, 132, N, O, P, R, R, S, pages 25 to 27, inclusive).

There was also found in the tin boxes a memorandum of names mentioning, among others, J. W. Cody & Company and G. F. Balmer (see People's Exhibit 114, page 26).

Balmer testified that he was interested in J. W. Cody & Company, as was also the defendant (page 78).

There was also found in one of these boxes a lease (People's Exhibit T) to Albert J. Adams of certain rooms in the Hotel Netherlands (pages 27, 54). The People proved that during the time mentioned in the lease defendant Adams lived at the Hotel Netherlands in New York City (page 54).

There was also found in one of the boxes a white envelope (People's Exhibit 134) bearing the words "A. R. Baker, report" (page 25). These words were claimed to have been written by the defendant (page 37).

There was a memorandum in the red book (People's Exhibit 23), aforedescribed as having been found in the desk, relating to A. R. Baker (page 37).

A paper was taken from one of the tin boxes (People's Exhibit 121, page 26) containing memoranda referring, among other things, to A. R. Baker, McLain-Simpson papers, brewery papers, Cody matter and the policy bill. Papers referring to the same matters were described above to have been taken from the desk and the trunk in the same room.

There were a number of other papers taken from the tin boxes, the contents of which bore the alleged handwriting of the defendant. Such papers were People's Exhibits 112, 115, 119, 120, 122, 124 and 132 (see page 37).

After the ransacking had been completed, the trunk, the three tin boxes and the wastepaper basket, with their respective contents, were carried down to a carriage in front of the premises and taken down to the Criminal Court Building.

A couple of days afterwards the trunks and boxes were opened in the District Attorney's office and the contents, together with the papers in the waste-paper basket, were marked for identification (see Case, pages 15–16).

On January 16th, 1902, after the raid, and upon the testimony of County Detective Hammond, the indictment against this defendant was found (see Case, page 3).

It was solely upon the evidence furnished by the papers and documents obtained as a result of the raid that the defendant was convicted.

NOT A SCINTILLA OF EVIDENCE FROM ONE END OF THE RECORD TO THE OTHER TENDING TO SHOW THAT THE DEFENDANT EVER ENGAGED IN THE GAME OF POLICY, OR THAT ANY OF THE PAPERS FOUND HAD BEEN DIRECTLY USED IN THE PLAYING THEREOF, CAN BE FOUND, BUT THE PROOF WAS WHOLLY OF A CIRCUMSTANTIAL CHARACTER.

For the purpose of proving that the rolls in the newspaper wrappings were policy "manifold sheets," persons claiming to be familiar with the game were called, who testified as to the method of play, and that in their opinion the rolls of paper were policy "manifold sheets."

See testimony of Hammond, pages 19–20.
" " " Reardon, page 55.

To show the possession thereof knowingly by the defendant it was claimed that the handwriting endorsed on the wrappers was his, and that the room in which they were found was his private office.

To prove these facts all of the contents of the trunk, tin boxes and desks were offered in evidence against the protest and objection of the defendant, that many of them were concededly of a strictly private character, having no relation whatsoever to the game of policy, and that their reception in evidence would be in violation of his constitutional rights, protecting him against unreasonable searches and seizures and against compelling him to give evidence against himself (see Case, page 18).

After the reception of the papers in evidence, persons alleged to be familiar with the defendant's handwriting were called as witnesses, who, upon being shown papers concededly of a private nature, testified that they contained handwriting of the defendant, and the papers so identified, against the defendant's objection and exception, were thereupon offered in evidence by the prosecution as so-called standards of comparison.

To make the chain complete, an expert in handwriting was then called, who swore that the handwriting on the private papers so identified, as well as on numerous others of the private papers and documents, was the same handwriting as on the wrappers containing the alleged "manifold sheets." This evidence, supplemented by testimony to the effect that the office in which the trunk, tin boxes and desk were found was the private office of the defendant, was the entire evidence upon which the defendant was found guilty.

It was in no way shown, nor was it even claimed, that the game of policy had ever been played on the raided premises, nor, as we have said, was there any evidence whatsoever to connect the defendant directly with that game, or with the possession of the so-called "manifold sheets."

It was, on the other hand, expressly shown that persons other than the defendant had daily and common access to the room in which the search was made and the papers seized, it being used daily by Pocher & Company for closing real estate deals and for other purposes (see Case, pages 74-75).

It was also positively testified that no gambling game of any nature or character had ever been carried on in the premises (see Case, page 75).

At the time of the raid the manager of Pocher & Company demanded to know by what right the search was being conducted, and the only answer he got was that he would be arrested if he did not stop fooling with them, and when he insisted, the raiding party said: "We will show you by arresting you," and excluded him from the room (see Case, page 77).

Upon the trial no search warrant was produced, but when the defendant offered testimony to the effect that none had ever existed, he was not allowed to do so; and when he demanded the production of the search warrant, the District Attorney replied that the paper had disappeared (see Case, pages 81-82).

Not only were the defendant's constitutional rights violated by the reception of his private papers and documents unlawfully seized, and used in evidence against his will, but we will also contend that the statute under which he was convicted is wholly unconstitutional.

By the terms of that act the mere fact of possession of a paper used in the game of policy, or the possession of a paper of a kind such as is commonly used in that game, is made *prima facie* evidence of guilt, whether or not the person in whose possession they were found had himself either used, or intended to use, them in connection with that game, *and even without actual knowledge on his part of the character of the papers in his possession.*

Moreover, the statute makes the simple possession of an article relating to or representing a chance or share *in a game already played* a criminal offense. After a game of policy has been played, the articles relating to that special game, or used in connection therewith, become absolutely valueless so far as participation in any further game is concerned. The articles used, according to the testimony, are simply bits of paper with combinations of figures written on them.

Nevertheless, possession of these pieces of paper, of a nature and kind such as are in universal use, and in themselves entirely innocuous, is made by the statute *prima facie* evidence of a crime, and brands the holder a common gambler.

In addition the statute makes the possession *prima facie* evidence of guilt *only in the case of a private citizen.*

Any person occupying the position of a public officer, whether or not his position in the public service is such as to entitle him, in his official capacity, to the possession of such papers, is excepted from the presumption of guilt which attaches to every private citizen.

We will contend that for these reasons the statute is unconstitutional.

Upon the evidence adduced the case was sent to the jury, who, after returning twice—the first time stating that they could not agree, and the second time for further instructions from the Court as to the amount of proof necessary to convict—returned a verdict of guilty.

See Case, pages 90-93.

Upon this finding the defendant was sentenced to imprisonment in the State Prison, at hard labor, for the term, the minimum of which shall not be less than one year and the maximum of which

shall not be more than one year and nine months and to pay a fine of $1,000.

See Case, page 5.

Under this sentence the plaintiff in error is now, and since April 27th, 1903, has been, confined in the State Prison at Sing Sing.

From the judgment of conviction the defendant appealed to the Appellate Division of the Supreme Court, in the First Department, where the case was heard before four judges, and by them the judgment was affirmed.

The opinion of the Appellate Division is reported in

People *v.* Adams, 85 App. Div., 390.

From the judgment of affirmance the plaintiff in error appealed to the Court of Appeals, where the judgment was also affirmed.

The opinion of the Court of Appeals is reported in

People *v.* Adams, 176 N. Y., 351.

A writ of error to review the judgment of the Court of Appeals was granted by MR. JUSTICE PECKHAM, and pursuant to such writ, the case now comes before this Court for review.

Assignment of Errors.

The errors assigned are:

First.—THAT THE COURT ERRED IN HOLDING THAT BY THE RECEPTION IN EVIDENCE OF THE DEFENDANT'S PRIVATE PAPERS SEIZED IN THE RAID OF HIS PREMISES, AGAINST HIS PROTEST AND WITHOUT HIS CONSENT, WHICH HAD NO RELATION WHATSOEVER TO THE GAME OF POLICY, FOR THE POSSESSION OF

PAPERS USED IN CONNECTION WITH WHICH SAID GAME HE WAS CONVICTED, HIS CONSTITUTIONAL RIGHT TO BE SECURE IN HIS PERSON, PAPERS AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, WAS NOT VIOLATED, AND THAT HE WAS ALSO THEREBY NOT COMPELLED TO BE A WITNESS AGAINST HIMSELF IN CONTRAVENTION OF THE FOURTH, FIFTH AND FOURTEENTH ARTICLES OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Second.—THAT THE COURT ERRED IN HOLDING THAT THE STATUTE, SECTIONS 344A AND 344B OF THE PENAL CODE OF THE STATE OF NEW YORK, UNDER WHICH THE INDICTMENT AGAINST THE PLAINTIFF IN ERROR WAS FOUND, AND HIS CONVICTION WAS HAD, DID NOT DEPRIVE HIM OF RIGHTS, PRIVILEGES AND IMMUNITIES SECURED TO OTHER CITIZENS OF THE UNITED STATES AND OF SAID STATE OF NEW YORK, NOR OF LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF SECTION I OF THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Third.—THAT THE COURT ERRED IN AFFIRMING THE JUDGMENT OF CONVICTION, AND IN REFUSING TO DISCHARGE THE PLAINTIFF IN ERROR FROM CUSTODY.

See Assignment of Errors, page 121.

ARGUMENT.

Point I.

The record in this case presents a Federal question which should be reviewed by this Court.

First.—When the private papers seized in the raid of the defendant's premises were offered in evidence upon the trial, their reception was objected to on the express ground that their introduction would be in violation of the defendant's rights secured to him by the Constitution of the United States.

The specific language of the objection is:

> "*Mr. Ridgway:* I object to it on the "ground that it appears by the testimony "that the exhibits sought to be introduced "in evidence were the result of a seizure of "the defendant's personal papers under a "search warrant, and I take the ground that "the introduction of the same in evidence "against his objection, is compelling him to "be a witness against himself in violation of "the *Constitution of the United States* and "the State of New York, and I protest on "his behalf against their reception, and say "that it is without his consent that they are "now offered. Objection overruled; excep-"tion."

See Record, page 18.

This specific objection, it was clearly understood, applied to all of the papers seized in the raid, *including the private papers*, having no relation whatsoever to the game of policy.

> "*The Court:* I understand that you have "a general objection, without the necessity

"for specifying, and that it applies to all the "papers taken from the desk, trunk, or tin "boxes. Of course, if there be any special "objection to any particular thing apart "from *the general objection, if you will call* "my attention to it, I will rule upon it.

"*Mr. Ridgway:* I suppose there might be "additional objection to the private bills and "papers, which are being read out here on "the ground that they do not relate to the "game of policy, and there is no pretense "that they do."

See Record, page 21.

It also distinctly appears that the question of the violation of the defendant's rights, as secured by the Federal Constitution was presented to, and decided adversely upon the appeals to the Appellate Division of the Supreme Court and to the Court of Appeals.

Upon the appeal to the Court of Appeals, it is expressly stated in the opinion, as follows:

"The first point made by the learned coun- "sel for the appellant is that by reason of the "seizure of defendant's papers, as in the "manner prescribed, the defendant's consti- "tutional right to be secure in his person, "papers and effects against unreasonable "searches and seizures, was violated, and he "was also thereby compelled to be a witness "against himself *in contravention of the* "*Fourth, Fifth and Fourteenth Articles of* "*Amendment to the Constitution of the* "*United States* and Article 1, Section 6, of "the Constitution of the State of New York, "and Section 2 of the bill of rights of this "State."

See Opinion, BARTLETT, J., Record, page 114.

That the question as to the constitutionality of the statute under which the indictment was found was also expressly before and considered by the Court of Appeals, is equally clear from the language of the opinion.

> "The next point argued by the appellant's
> " counsel is that Sections 344a and 344b of
> " the Penal Code, under which the indict-
> " ment was found and the conviction had,
> " are unconstitutional and void for the reason
> " that the defendant has been deprived of his
> " liberty and property without due process
> " of law in violation of both *the Federal* and
> " State Constitutions."

See Case, page 116.

It, therefore, distinctly appears, by the record, we submit, that the questions sought to be raised by the assignment of errors were distinctly presented to and passed upon adversely to the defendant's contention in the State courts.

Second.—There still remains for consideration, however, the further question whether either or both of the questions sought to be raised are rights secured to the defendant by the Federal Constitution, and this will involve an examination into the grounds upon which the alleged rights are based.

(1st). It was said by the Court of Appeals that
" Articles Fourth and Fifth of the Amendments to
" the Constitution of the United States do not
" apply to actions in the State courts."

See Opinion BARTLETT, J., Record, page 114.

This statement undoubtedly is based upon statements made in the opinions of this Court, to the effect that the first ten amendments are restrictions only on Federal power, and have no application to

proceedings in the State courts. While, so far as the first ten amendments themselves are concerned, the statement may be accurate, nevertheless, since the adoption of the Fourteenth Amendment, it is accurate in so far, and in so far only, as the rights specifically enumerated do not appertain to the fundamental rights, privileges and immunities of American citizenship.

In the cases of MAXWELL *v.* DOW (176 U. S., 581), and in BROWN *v.* NEW JERSEY (175 U. S., 582), this Court took occasion to examine critically and at length the various decisions upon the application of the first ten amendments to proceedings in the State courts.

In the MAXWELL case the question was whether a State had the right to prosecute a crime above the grade of misdemeanor by information instead of by an indictment by a Grand Jury, and in the BROWN case the question was whether a trial by a struck jury in a murder case, in conformity to a State statute providing that the Court may select from the persons qualified to serve as jurors, 96 names from which the prosecutor and defendant may each strike 24, and the remainder of which shall be put in the jury box, out of which the trial jury shall be drawn in the usual way, was in violation of the provision of the Federal Constitution as to "due process of law."

It was held that neither was a violation of the provisions of the Federal Constitution.

But from the reasoning of the opinions and from the cases cited, it is clear that the decisions went on the ground that neither a prosecution by indictment nor a trial by a jury of twelve persons chosen according to the course of the common law, *is a privilege or immunity guaranteed to citizens of the United States when prosecuted for crime in the State courts;* and it clearly appears that this Court IN NO WAY HELD THAT ALL OF THE RIGHTS ENUMERATED IN THE FIRST TEN AMENDMENTS WERE NOT

PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP PROTECTED AGAINST VIOLATION BY STATE LAW.

This is made clear by the language of the opinion in the Maxwell case written by MR. JUSTICE PECKHAM.

After referring to many decisions of this Court upon the effect of the constitutional amendments, and especially of the Fourteenth Amendment, the learned Justice states:

> " We have cited these cases for the pur-
> " pose of showing that the privileges and im-
> " munities of citizens of the United States
> " *do not necessarily include* ALL *the rights*
> " *protected by the first eight amendments to*
> " *the Federal Constitution* against the powers
> " of the Federal Government. They were
> " decided subsequently to the adoption of
> " the Fourteenth Amendment, and *if the*
> " *particular clause of that amendment now*
> " *under consideration* had the effect claimed
> " for it in this case, it is not too much to say
> " that it would have been asserted and the
> " principles applied in some of them."

After so stating, the question is discussed whether trial by a jury according to the course of the common law, is a necessary requisite of due process of law protected by the Federal Constitution, and upon a review of the cases, the conclusion was reached that such a trial *was not one of those fundamental rights included in the phrase " due process of law,"* and the language of MR. JUSTICE BREWER in BROWN *v.* NEW JERSEY (*supra*) was quoted and approved to the effect " that the State has full control over " *the procedure in its courts*, both in civil and crim- " inal cases, subject only to the qualification that " *such procedure* MUST NOT WORK A DENIAL OF FUN- " DAMENTAL RIGHTS, or conflict with specific and " applicable provisions of the Federal Constitu- " tion."

Maxwell *v.* Dow (*supra*).

Hence we have to consider whether the rights claimed to have been violated in the case at bar are *fundamental rights* secured to the defendant by the Federal Constitution, and particularly by the Fourteenth Amendment, providing that "No State "shall make or enforce any law *which shall* "*abridge the privileges or immunities of citizens of* "*the United States; nor* shall any State *deprive* "*any person of life, liberty or property without due* "*process of law, nor deny to any person within its* "*jurisdiction the equal protection of the laws.*"

U. S. Constitution, 14th Amendment.

(2d). The rights of a person to be secure in his person, papers and effects against unreasonable searches and seizures, and not to be compelled in a criminal case to be a witness against himself, are fundamental rights of American citizenship and protected by the Federal Constitution against legislation by the States.

In Maxwell *v.* Dow (*supra*), Mr. Justice Harlan, in his dissenting opinion, argued that if the right to a trial by jury according to the course of the common law could be abrogated by State legislation, it would follow that other rights covered by the first ten amendments, and which the learned Justice stated, *no one doubts were regarded by the framers of the Constitution as fundamental rights and privileges*, could also be abrogated and annulled.

And among those fundamental rights *protection against unreasonable searches and seizures and not to be a witness against himself*, were specifically classed.

The learned Justice said:

> "I take it, no one doubts, that the great "men who laid the foundations of our Gov- "ernment regarded the preservation of the

" privileges and immunities specified in the
" first ten amendments as vital to the per-
" sonal security of American citizens. To
" say of any people that they do not enjoy
" those privileges and immunities is to say
" that they do not enjoy real freedom. But
" suppose that a State should prohibit the
" free exercise of religion, or abridge the
" freedom of speech or of the press, or for-
" bid its people from peaceably assembling
" to petition the Government for a redress
" of grievances, or authorize soldiers in
" time of peace to be quartered in any house
" without the consent of the owner, or
" *permit the persons, houses, papers and ef-*
" *fects of the citizens to be subjected to unrea-*
" *sonable searches and seizures under war-*
" *rants not issued upon probable cause, nor*
" *supported by oath or affirmation, nor de-*
" *scribing the place to be searched and the*
" *persons or things to be seized;* or allow a
" person to be twice put in jeopardy of life
" or limb; *or compel the accused to be a wit-*
" *ness against himself;* or deny to the ac-
" cused the right to be informed of the
" nature and cause of the accusation against
" him, to be confronted with the witnesses
" against him, to have compulsory process
" for obtaining witnesses in his favor, or to
" have the assistance of counsel; or require
" excessive bail; or inflict cruel and unusual
" punishment. These, or any of these things
" being done by a State, this Court, accord-
" ing to the reasoning and legal effect of the
" opinion just delivered, would be bound to
" say that the privileges and immunities
" specified were not privileges and immuni-
" ties of citizens of the United States within
" the meaning of the Fourteenth Amend-
" ment, and that citizens of the United
" States affected by the action of the State

> "could not invoke the protection of that
> "amendment, or of any other provision of
> "the national Constitution."

After making these observations, the learned Justice continues:

> "If a State can take from the citizen
> "charged with crime the right to be tried by
> "a jury of twelve persons, it can, so far as
> "the Constitution of the United States is
> "concerned, take away the remaining privi-
> "leges and immunities specified in the
> "national Bill of Rights."
>
> Maxwell *v.* Dow (*supra*), Opinion, HARLAN, J.

We have quoted at length from the opinion of the majority of the Court and the opinion of JUSTICE HARLAN for the purpose of showing that while *some* of the rights specified in the first ten amendments, and particularly such as relate to mere matters of procedure, are not applicable to the States, nevertheless that it was not decided or intended to be that *all of the rights and privileges enumerated therein* were beyond the protection of the Federal Constitution against State legislation, and that, among the inviolable and fundamental rights are the protection of the citizen in his person, papers and effects against unreasonable searches and seizures and against being compelled in a criminal case to be a witness against himself, and that to deny him such rights would be to deny him fundamental rights of American citizenship in violation of the Fourteenth Amendment, prohibiting a State from making and enforcing any law abridging the "privileges or immunities of citizens of the "United States."

In at least two cases the precise question raised by the first assignment of error was presented to this Court, but in both of those cases the Court re-

fused to pass upon the question on the sole ground that no Federal question *had been raised and considered by the State Court.*

There is no intimation, however, that if a violation *of the Federal Constitution had been the ground of objection in the State Court*, and an adverse decision had been reached, a Federal question would not have been presented for review by this Court.

Levy *v.* Superior Court of San Francisco, 167 U. S., 175.

Mallett *v.* North Carolina, 181 U. S., 589.

We intend to review these decisions more at length under a subsequent point. Our present purpose is to cite them in support of our argument that a Federal question is presented by the record in the case at bar because objection was specifically taken to the use of the private papers *on the ground of a violation of the Federal Constitution*, and in all of the State courts before which the case was brought for review, that question was considered and decided adversely to the defendant.

We, therefore, submit that the question raised by the first assignment of error presents a Federal question which should be reviewed by this Court.

(3d). THE QUESTION PRESENTED BY THE SECOND ASSIGNMENT OF ERROR IS ALSO A FEDERAL QUESTION AND COGNIZABLE BY THIS COURT.

It is claimed that the statute under which the defendant was indicted is unconstitutional in that thereby he has been deprived of his liberty without "due process of law."

This claim is based on the fact that the statutes prescribe that a person "*who shall have in his pos-*
"*session knowingly any writing, paper or docu-*
"*ment, representing or being a record of any*
"*chance, share or interest in numbers, sold, drawn,*

" *or to be drawn, or in what is commonly called policy* " * * * *or any paper, print, writing, device, policy* " *slip or article of any kind, such as is commonly* " *used in carrying on, promoting or playing the* " *game commonly called policy* * * * *is a common* " *gambler and punishable by imprisonment for not* " *more than two years, and in the discretion of the* " *Court by a fine of $1,000, or both,*" and, further, " that "THE POSSESSION BY ANY PERSON OTHER " THAN A PUBLIC OFFICER * * * IS PRESUMPTIVE " EVIDENCE OF POSSESSION THEREOF KNOWINGLY, " AND IN VIOLATION OF THE PROVISIONS OF SECTION " 344A."

See Penal Code, Secs. 344a and 344b.

The grounds upon which it is claimed this statute is unconstitutional are:

1st. *That to create an arbitrary presumption of guilt is to deprive a defendant of his liberty and property without "due process of law," in that the right to be presumed innocent until he is proven to be guilty is taken away, and the right to a jury trial is thereby curtailed.*

State *v.* Beswick, 13 R. I., 211.
Wynehamer *v.* People, 13 N. Y., 446.

2d. *That to except from the presumption of guilt created by the mere fact of possession, every public officer, and to make that presumption applicable only in the case of a private citizen, is to deny the equal protection of the laws.*

3d. *That to make the possession of articles similar to those in universal use, i. e., pieces of papers with combinations of figures upon them, and incapable of injury to others and in themselves harmless, a criminal offense is an arbitrary exercise of power.*

Assuming for the purpose of argument under this point that we are right in our contention, the

defendant has been deprived of his liberty without "due process of law," and has been denied the equal protection of the laws within the meaning of the Fourteenth Article of Amendment.

This brings us, then, to the discussion of the merits of the questions presented by the Assignment of Errors, viz.:

1st. HAS THE DEFENDANT'S CONSTITUTIONAL RIGHT TO BE SECURE IN HIS PERSON, PAPERS AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, AND NOT TO BE A WITNESS AGAINST HIMSELF IN A CRIMINAL CASE, BEEN VIOLATED BY THE PROCEEDINGS IN THE CASE AT BAR? AND

2d. HAS THE DEFENDANT BEEN DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW, OR DENIED THE EQUAL PROTECTION OF THE LAWS?

Point II.

By the reception in evidence of the defendant's private papers, seized in the raid of December 12th, 1901, which had no relation whatsoever to the game of policy, his constitutional right to be secure in his person, papers and effects against unreasonable searches and seizures was violated, and he was also thereby compelled to be a witness against himself in contravention of the Fourth, Fifth and Fourteenth Articles of Amendment to the Constitution of the United States.

First.—It will be wholly impracticable and unnecessary to refer in detail to each of the papers

offered in evidence for the purpose of creating the so-called standards of comparison, and of showing that the room in which the alleged contraband goods was found was the private office of the defendant.

Suffice it to say that many of them were concededly papers of the most personal character, among others, a bill rendered to the defendant by the Hotel Savoy (Exhibit M, page 50); an option upon certain mining products in Mexico (see Exhibits G and H, page 106); a small card bearing the words "Amasa Thornton, Lawyer, 150 Broadway, "New York," on the back of which was written in ink: "Dear Al—I left the papers with Bauerdorf; "meet me there to morrow at 11 A. M. A. T." (Exhibit C, page 106).

For the purpose of illustrating the method of proof pursued by the prosecution, we have selected one or two of the so-called standards of comparison and one or two of the wrappers on the "manifold sheets" which were used in proving his case by the learned District-Attorney.

People's Exhibit 143a is a piece of newspaper that was wrapped around a roll of "manifold sheets" similar to those contained in People's Exhibit 11, on which were the words and figures "X Novem- "ber 15" and "November 15, '01," written in print with black lead pencil. (see Case, page 104).

People's Exhibit Ca is also a piece of newspaper that was wrapped around the roll marked People's Exhibit C, containing "manifold sheets" similar to those contained in People's Exhibit 11, on which were the words "November 25 X" written in print with blue lead pencil (see Case, page 104).

To prove that the handwriting on these wrappers was the defendant's handwriting, it was testified by the witnesses Steele and Balmer, who claimed to be familiar with the defendant's handwriting, that among numerous other papers, People's Ex-

hibits 50, 60 and 61 were in the handwriting of the defendant.

See testimony of Steele, page 34.
See testimony of Balmer, page 51.

Exhibit 50 is a piece of white paper bearing various words and figures, including the words "November 5th, 1900" (see Case, page 98).

Exhibit 60 is a piece of white paper also bearing various numbers and names of streets and columns of figures; one column being headed "taxes," printed by hand in blue lead pencil (see Case, page 98).

People's Exhibit 61 is a similar piece of paper containing various names of streets and numerous columns of figures; one column being headed "rent," written in lead pencil, another column being headed "exp.," another "int. checks," and another "total exp.," and still another "profit and loss." (see Case, page 98).

This evidence, and all other of like character, was repeatedly objected to by the defendant on the ground that the papers were purely of a private character, having no relation whatsoever to the game of policy; that possession of them was obtained without his consent and against his protest, and as the result of an unreasonable search and seizure, and that their reception in evidence would be in violation of his constitutional rights as secured both by the United States Constitution and the Constitution of the State of New York.

See Case, pages 18-28; page 34; page 51.

The objection was, however, overruled, and the witness Carvalho, an alleged expert, was called, who testified, using the papers identified as standards of comparison, that the handwriting on the wrappers enclosing the "manifold sheets" was the

same handwriting as in the papers exhibited as standards.

See testimony of Carvalho, pages 70-71, fol.

Second.—THE RIGHTS CLAIMED TO HAVE BEEN VIOLATED BY THIS PROCEDURE ARE SECURED TO THE DEFENDANT BY THE FOURTH, FIFTH AND FOURTEENTH ARTICLES OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(*A*). By the Fourth Article of Amendment it is provided:

> "The right of the people to be secure in "their persons, houses, *papers* and effects "against unreasonable searches, and seizures "shall not be violated; and no warrant shall "issue, but upon probable cause, supported "by oath of affirmation, and particularly de- "scribing the place to be searched and the "person or things to be seized."

See U. S.. Constitution, Fourth Amendment.

By the Fifth Article of Amendment it is provided:

> "No person * * * shall be compelled "in any criminal case to be a witness against "himself nor be deprived of life, liberty or "property without due process of law."

See U. S. Constitution, Fifth Amendment.

By the Fourteenth Article of Amendment, it is provided:

> "*No State* shall make or enforce any law "which shall abridge the privileges or im- "munities of citizens of the United States; "*nor shall any State* deprive any person of

"life, liberty or property without due process "of law, nor deny to any person within its "jurisdiction the equal protection of the "laws."

See U. S. Constitution, Fourteenth Amendment.

(*B*). The reasons which gave rise to the enactment of these provisions are well known. They were deemed essential to the enjoyment of that individual liberty and security of person and property which it was the object of both the Federal and State Governments to secure.

That those rights were grossly violated by the method of proof adopted in this case, we consider, has been expressly decided by this Court.

Boyd *v.* U. S., 116 U. S., 616.

That case is well known, and a mere citation of it would seem to be all that were necessary, were it not for the fact that it was held to be distinguishable from the present case by the State Courts.

In the BOYD case the proceedings were *in rem* to establish the forfeiture of goods alleged to have been fraudulently imported without paying duties thereon, and the question was whether an act of Congress authorizing a court of the United States in revenue cases, on motion of the Government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the attorney to be taken as confessed, was constitutional.

Conceding that the facts in that case are different from those in the case at bar, nevertheless, the views expressed in the opinion and the reasons given for the conclusion arrived at, are directly applicable and conclusive here.

As the reasoning of MR. JUSTICE BRADLEY is the strongest argument which can possibly be made in

favor of our contention, we cannot forbear quoting therefrom at length.

The learned Justice, speaking first of the nature of the proceedings intended by the Fourth Amendment, says:

> "In order to ascertain the nature of the "proceedings intended by the Fourth Amend- "ment to the Constitution under the terms "'unreasonable seizures and searches,' it is "only necessary to recall the contemporary "or then recent history of the controversies, "both in this country and in England. The "practice had obtained in the colonies of is- "suing writs of assistance to the revenue "officers, empowering them in their discre- "tion to search suspected places for smug- "gled goods which James Otis pronounced "'the worst instrument of arbitrary power, "the most destructive of English liberty and "the fundamental principles of law, that "ever was found in an English law book;' "since they placed 'the liberty of every man "in the hands of every petty officer.' This "was in February, 1761, in Boston, and the "famous debate in which it occurred was "perhaps the most prominent event which "inaugurated the resistance of the colonies "to the oppressions of the mother country. "'Then and there,' said John Adams, 'then "and there was the first scene of the first "act of opposition to the arbitrary claims of "Great Britian. Then and there the child "Independence was born.'"

JUSTICE BRADLEY then refers to the case of WILKES and LORD CAMDEN'S discussion of the subject, and continues:

> "As every American statesman, during "our revolutionary and formative period of "the nation, was undoubtedly familiar with

"this monument of English freedom and
"considered it as a true and ultimate ex-
"pression of constitutional law, it may be
"confidently asserted that its propositions
"were in the minds of those who framed
"the Fourth Amendment to the Constitu-
"tion, and were considered as sufficiently
"explanatory of what was meant by 'un-
"reasonable searches and siezures.'"

And quoting the words of LORD CAMDEN, he observes:

"Papers are the owner's goods and chat-
"tels; they are his dearest property; and
"are so far from enduring a seizure that
"they will hardly bear inspection; and
"though the eye cannot by the laws of
"England be guilty of a trespass, yet,
"where private papers are removed and
"carried away, the secret nature of those
"goods will be an aggravation of the tres-
"pass, and demand more considerable dam-
"ages in that respect."

Commenting upon LORD CAMDEN'S opinion, JUSTICE BRADLEY says:

"The principles laid down in this opinion
"affect the very essence of constitutional
"liberty and security. They reach farther
"than the concrete form of the case then
"before the Court, with its adventitious cir-
"cumstances; they apply to all invasions on
"the part of the government and its em-
"ployees, of the sancity of a man's home and
"the privacies of his life. *It is not the break-*
"*ing of his doors and the rummaging of his*
"*drawers that constitutes the essence of the*
"*offence; but it is the invasion of his inde-*
"*feasible right of personal security, per-*
"*sonal liberty and private property, where*

"*that right has never been forfeited by his* "*conviction of some public offence; it is* "*the invasion of this sacred right which* "*underlies and constitutes the essence of* "*Lord Camden's judgment.* Breaking into "a house and opening boxes and doors are "circumstances of aggravation; *but any* "*forcible and compulsory extortion of* "*man's own testimony, or of his private* "*papers, to be used as evidence to convict* "*him of crime, or to forfeit his goods, is* "*within the condemnation of that judgment.* "In this regard the Fourth and Fifth Amend- "ments run almost into each other. Can "we doubt that when the Fourth and Fifth "Amendments of the Constitution of the "United States were penned and adopted, "the language of Lord Camden was relied "on as expressing the true doctrine on the "question of searches and seizures and as "furnishing the true criteria of the reasona- "ble and unreasonable character of such "seizures."

As to the relation between the Fourth and Fifth Amendments the opinion continues:

"We have already noticed the intimate "relation between the two amendments. "They throw great light on each other. For "the 'unreasonable searches and seizures' "condemned in the Fourth Amendment are "almost always made for the purpose of "compelling a man to give evidence against "himself, which, in criminal cases, is con- "demned in the Fifth Amendment; and "compelling a man 'in a criminal case to "be a witness against himself,' which is con- "demned in the Fifth Amendment, throws "light on the question as to what is 'an un- "reasonable search and seizure' within "the meaning of the Fourth Amendment.

"And we have been unable to perceive that "the seizure of a man's private books and "papers, to be used in evidence against him, "is substantially different from compelling "him to be a witness against himself. We "think it within the clear intent and mean- "ing of those terms."

Boyd *v.* United States (*supra*).

Could a stronger argument be made in support of the defendant's contention? Or could facts be shown which would bring a case more clearly within the prohibition of the constitutional provisions, as thus construed, than were shown in the case at bar?

Concededly, the sole object of the raid was to obtain evidence upon which not only to prove the defendant's guilt, after indictment, but upon which *to base an indictment* against him. That raid was made by the Chief County Detective of the District Attorney's office, the prosecutor of New York County, and it was upon his testimony, based upon the fruits of that raid, that the indictment, as well as the conviction of the defendant, was based.

Upon the trial it was claimed that the raid and search was made under a search warrant. But no search warrant was produced, and when the defendant attempted to show that none ever was in existence, the testimony offered was ruled out (see Record, pages 81-82). When he demanded its production, a statement was made by the District Attorney that the search warrant had disappeared, and could not be found (see Record, page 8).

Even if, however, a search warrant was in existence, it could not authorize to be done the acts which were done, viz., *the seizure of the defendant's private papers.*

By Section 792 of the New York Code of Criminal Procedure it is provided upon what grounds a search warrant may be issued:

"1. When the property was stolen or em-
" bezzled; in which case it may be taken, on
" the warrant, from any house or other place
" in which it is concealed, or from the posses-
" sion of the person by whom it was stolen
" or embezzled, or of any other person in
" whose possession it may be.

"2. When it was used as the means of
" committing a felony; in which case it may
" be taken, on the warrant, from any house
" or other place in which it is concealed, or
" from the possession of the person by whom
" it was used in the commission of the crime,
" or of any other person in whose possession
" it may be.

"3. When it is in the possession of any
" person, with the intent to use it as the
" means of committing a public offense, or
" in the possession of another, to whom he
" may have delivered it for the purpose of
" concealing it, or preventing its being dis-
" covered; in which case it may be taken, on
" the warrant, from such person, or from a
" house or other place occupied by him, or
" under his control, or from the possession
" of the person to whom he may have so de-
" livered it."

See Code of Criminal Procedure, Sec. 792.

No authority is given by this section for the seizure of private papers and documents not relating to the offense.

But in our view of the question, it would make no difference whether a search warrant was in existence or not. The protection of the constitutional provision is directed not only against the unlawful seizure, but also against the *unlawful use* after seizure.

Its real object and purpose is to prevent the seizure of a man's private papers *for the purpose of using them against him in a criminal prosecution, or to discover evidence of crime*, and not merely the prevention of the commission of a trespass, for which the common law always affords a remedy irrespective of constitutional provisions.

To repeat the language of MR. JUSTICE BRADLEY in the BOYD case (*supra*):

> " It is not the breaking of his doors and
> " the rummaging of his drawers that consti-
> " tutes the essence of the offence; *but it is*
> " *the invasion of his indefeasible right of*
> " *personal security, personal liberty and pri-*
> " *vate property, where that right has never*
> " *been forfeited by his conviction of some*
> " *public offence.* * * * "

Boyd *v.* United States (*supra*).

The precise point for which we are contending was decided in UNITED STATES *v.* WONG QUONG WONG (*supra*), in which case DISTRICT JUDGE WHEELER, answering the contention that the Court would not concern itself with the method of procuring the evidence, said:

> " It has been said that the manner of ob-
> " taining such evidence, whether by force or
> " fraud, does not affect its admissibility;
> " BUT THESE CONSTITUTIONAL SAFEGUARDS
> " WOULD BE DEPRIVED OF A LARGE PART OF
> " THEIR VALUE IF THEY COULD BE INVOKED
> " ONLY FOR PREVENTING THE OBTAINING OF
> " SUCH EVIDENCE, AND NOT FOR PROTECTION
> " AGAINST ITS USE. The cases cited show
> " THAT THEY COVER THE USE OF PAPERS FOR
> " TESTIMONY WHEN IT WOULD BE A CARRYING
> " OUT OF THEIR VIOLATION."

United States *v.* Wong Quong Wong (*supra*).

While, so far as our examination of the decisions of this Court discloses, the views expressed in the BOYD case have not been applied to a case involving facts precisely similar to the one at bar, the precise point raised in this case has, however, been presented in at least two other cases, but was not decided, because this Court held that the question had not properly been presented for decision and considered by the State courts.

> Levy *v.* Superior Court of San Francisco (*supra*).
> Mallett *v.* North Carolina (*supra*).

In the LEVY case the writ of error was to the Supreme Court of the State of California to review an order denying a writ of prohibition against the Superior Court of San Francisco to command that Court to refrain from trying certain issues and allegations in a proceeding pending therein relating to the estate of a deceased person.

MR. JUSTICE HARLAN, writing for this Court, said:

> "This writ of error must be dismissed for "want of jurisdiction in this Court to re-ex- "amine the final judgment of the Supreme "Court of California. The plaintiff claimed "in the State Court that certain provisions "of the State enactment referred to were "repugnant to the Constitution of Califor- "nia. But he did not in the State Court "draw in question any statute of the State "upon the ground that it was repugnant to "the Constitution of the United States, nor "specially set up or claim in that court any "right, title, privilege or immunity under "the Constitution of the United States. He "insists in this Court that the enforcement "of the above statutory provisions was a "denial of the equal protection of the laws— "a denial forbidden by the Fourteenth

"Amendment of the Constitution of the "United States. But this record does not "show that he made any such claim in the "State Court. The reference in the opinion "of that Court to the cases of Boyd *v.* "United States and Counselman *v.* Hitch-"cock was for the purpose of ascertaining "the proper construction of certain provis-"ions of the Constitution of California, not "as defining rights asserted by the plaintiff "under the Constitution of the United "States. From the pleadings in the cause "the State Court had no reason to suppose "that the plaintiff specially claimed that "the statute in question deprived him of any "right secured by the Constitution of the "United States. * * * If the plaintiff "intended to claim that the statute in ques-"tion was repugnant to the Constitution of "the United States, he should have so de-"clared."

Levy *v.* Superior Court of San Francisco (*supra*).

In the MALLETT case, it appeared that the plaintiff in error and one Mehegan were indicted and tried in a criminal court of North Carolina for conspiracy to defraud and they were convicted and sentenced to two years imprisonment. An appeal was taken to the Superior Court of that State, which Court reversed the judgment and granted a new trial.

From this judgment the State appealed to the Supreme Court, which reversed the judgment of the Superior Court and remanded the cause to the Criminal Court with directions that the sentence imposed should be carried into execution.

At the time of the commission of the offense, and at the time of the trial, the State of North Carolina was not entitled to appeal to the Supreme Court

from the judgment of the Superior Court and one of the questions presented to this Court was whether the statute allowing such an appeal was *ex post facto*, which this Court decided was not the case; but the further question was presented as to whether, by the use of certain books of account belonging to the defendants in evidence against him, they were thereby made to be witnesses against themselves, and their privileges and immunities as citizens of the United States abridged and they were deprived of their liberty without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

In the opinion, which was written by MR. JUSTICE SHIRAS, it was said:

> "In the petition for a rehearing in the "Supreme Court, which, as we have seen, "is the only part of the record on which the "plaintiffs in error can rely as raising Fed- "eral questions, the point was thus pre- "sented:
>
> "That prior to the beginning of this "action an attachment against the property "of the defendants was issued at the in- "stance of J. M. Baker, administrator of M. "L. Woolard and of Solomon Woolard, who "is the chief prosecuting witness in the case. "By virtue of said attachment the Sheriff of "Edgecombe County seized the ledger and "counter book of the defendants and has "kept possession of them up to this time. "At the trial of the present indictment "the said books so wrongfully taken "from the defendants were offered "in evidence. The defendants ob- "jected; the objection was overruled, and "the defendants excepted. In this the de- "fendants submit there was error. For it is, "in effect, making the defendants give evi- "dence against themselves under the prin- "ciples laid down in the case of Boyd *v.*

" United States, 116 U. S., 616. At the " argument of this case at this term counsel " had not found this authority, and their " argument did not go upon this ground. " Since said hearing they found said case, " and they are advised that the principle and " the authority are decisive, and would at " once satisfy the Court of the defendants' " right to a new trial, if the matter could be " brought to its attention."

" The only ground of objection shown by " the record to have been taken by defend- " ants' counsel to the admission of this evi- " dence was because the testimony now " offered was subsequent to the examination " in the supplementary proceedings.

" Nothing seems to have been claimed, either " in the Criminal Court or in the Superior " Court, as to the inadmissibility of the " books as evidence on the ground of any " provision of the Federal Constitution. The " Supreme Court thus treated the subject:

" We will consider now the only exception " which the petition to reargue insists the " Judge of the Superior Court should have " passed upon and held in favor of the de- " fendants, *i. e.*, that the Sheriff, by attach- " ment, having seized the ledger and counter " book of the defendants, they were put in " evidence against them. There was cer- " tainly no error in using the defendants' " own entries against them. The shoes of a " party charged with the crime can be taken " and fitted to tracks as evidence, and in one " case, when a party charged with crime was " made to put his foot into the tracks, the " fact that it fitted was held competent. " State *v.* Graham, 74 N. C., 648. Nor has " it ever been suspected that if, upon a " search warrant, stolen goods are found in

"the possession of the prisoner, that fact can-
"not be used against him. Here the books
"came legally into the possession of another,
"and his telltale entries were competent
"against the parties making them in the
"course of their business."

"It therefore appears by the statement of
"the plaintiffs in error in their petition for a
"reargument that no Federal question was
"raised or considered in the criminal court
"or in the Superior Court, in respect to the
"admission of the evidence, so that there
"was no basis on which to claim error in
"this respect in those courts. Nor did the
"Supreme Court, in passing upon the con-
"tention, deal with it as a Federal question,
"but as a mere question arising under the
"administration of the criminal law of the
"State, and there is, therefore, nothing in
"its action for us to review."

Mallett *v.* North Carolina (*supra*).

Both of these cases, therefore, leave the question presented on this review open for decision by this Court.

(*C*). Passing to the State courts, we find decisions by the highest courts of Iowa and Vermont in which the principles discussed in the BOYD case were held directly applicable to facts similar to those in the case at bar.

State *v.* Sheridan (Iowa, October, 1903), 96 Northwestern Rep., 730.
State *v.* Slamon, 73 Vermont, 212.

In the Iowa case the defendant, an ice dealer, was charged with having maliciously injured or destroyed a quantity of ice belonging to a competitor in business by putting upon it a large quantity of

salt. The prosecuting witness claiming that his ice had been maliciously destroyed, and having been informed that the defendant bought a barrel of salt from a local merchant a day or two before that date, filed a preliminary information before a Justice of the Peace, and caused a warrant to issue for the defendant's arrest. At the same time the prosecuting witness filed an affidavit alleging the purchase of salt by the defendant, and stating his belief that the salt was used in perpetrating the crime above mentioned, and that the salt or the barrel in which it was contained was in the possession of the defendant at his residence, and he asked for a search warrant to search the defendant's residence and seize the barrel of salt, if found.

A search warrant was issued, and the officer in executing it, claimed to have found in the cellar of defendant's residence an empty salt barrel, and on the trial he identified the barrel so found, which was then offered and admitted in evidence over the defendant's objection.

In the opinion written by WEAVER, J., it was said:

> "It is conceded by the Attorney General
> " that the search warrant was issued with-
> " out the authority of law, and that the
> " search and seizure made thereunder were
> " wrongful. It was also shown by the evi-
> " dence upon the trial, and without dispute,
> " that the search warrant was asked for,
> " procured and served for the sole 'purpose
> " of obtaining testimony' against the appel-
> " lant. For the purposes of this appeal, we
> " may admit that it has often been held that
> " the mere fact that evidence has been de-
> " veloped by the wrongful act or trespass of
> " an officer or any other person will not
> " necessarily render it inadmissible, but we
> " are confronted by the further fact that the
> " evidence objected to was obtained by a
> " palpable abuse of judicial process.

"In the Height case, we said that while an "officer may properly testify to criminating "facts discovered by him in the execution of "a warrant wrongfully issued, yet 'a party "to a suit can gain nothing by virtue of vio- "lations under the pretense of process, nor "will a fraudulent or unlawful use of process "be sanctioned by the courts.'

"In such cases parties will be restored to "the rights and positions they possess, be- "fore they were deprived thereof by fraud, "violations or abuse of legal process. * * * "The search was for the mere purpose of "securing evidence by an invasion of the "private premises of the defendant, and we "think there is no consideration whatever "which will justify it. * * *

"The search was for the mere purpose of "securing evidence by the invasion of the "private residence of the defendant. The "sacredness of his person against such an "act is protected by no higher or stronger "guaranty than that of his home, his papers "and effects.

"In Boyd *v* U. S., 116 U. S., 616, the con- "stitutional prohibition of unreasonable "searches and seizures is said to be closely "related to the immunity which the citizen "enjoys against being compelled to be a "witness against himself, and it is there "held that the compulsory production by the "the defendant of an article to be used in "evidence against him in a prosecution for "crime or enforcement of a penalty, is in "effect a violation of that constitutional "provision. If, in that case, instead of or- "dering the defendant to produce the de- "sired article or paper, the Court, without "authority of law, had issued a search war- "rant, under which the Sheriff invaded the

" private room or safe of the defendant and " thus obtained the means of securing his " conviction, would not the violation of the " constitutional guaranty have been as pal- " pable, and the admission of the evidence " thus secured as clearly erroneous as was the " method actually employed? It is said, how- " ever, that the Court will not inquire how the " offered evidence has been procured, and " even if obtained by a search warrant in " violation of the defendant's constitutional " or legal rights, it will still be admitted, if " otherwise competent, and that defendant's " only redress is an action for damages against " the officer or person committing the tres- " pass. It is true, some cases give seem- " ing support to this doctrine, but most " of them, when examined, will be found to " be instances in which the incriminating evi- " dence has been discovered by persons acting " without color of authority, or by officers as " the incidental result of the service of a war " rant of arrest, or other writ or process le- " gally issued. None can be found, we think, " where the State has been permitted to ob- " tain a search warrant in confessed viola- " tion of law, and thereby took papers or " property from the home of the man sus- " pected of the crime, and used the matter " thus procured in securing his conviction. " To so hold, is to emasculate the consti- " tutional guaranty and to deprive it of all " beneficial force or effect in preventing un- " reasonable searches and seizures. We " think the evidence should have been ex- " cluded."

State *v.* Sheridan (*supra*).

In the case at bar it is expressly claimed that the search and seizure were under a search warrant

authorizing and commanding it. Hence the Iowa case is directly applicable.

In the Vermont case, the information was for grand larceny.

An officer had a search warrant to search the person of the defendant for stolen goods. While engaged in the search he found on the person of the defendant, and took from it, a letter written to him by a person whom he called as a witness, in the impeachment of whom the letter contained material testimony.

Upon the trial the State offered the letter in evidence, and it was admitted under objection and exception. In the opinion of TAFT, C. J., it was said:

> "The taking of the letter from the person "of the respondent was a plain violation of "the Eleventh Article of the Declaration of "Rights, which provides 'that the people "have a right to hold themselves, their "houses, papers and possessions free from "search or seizure and, therefore, warrants, "without oath or affirmation first made af- "fording sufficient foundation for them, and "whereby any officer or messenger may be "commanded or required to search sus- "pected places or to seize any person or per- "sons, his, her or their property, not par- "ticularly described, are contrary to that "right and ought not to be granted.'
>
> "It is needless to discuss this question. We "refer to the case of John Wilkes, of the "North Briton, whose house was searched "and his papers indiscriminately seized by "virtue of a warrant issued by Lord Halifax, "Secretary of State. In an action of tres- "pass Wilkes recovered £1,000 against Wood, "one of the parties who made the search, "and £4,000 against Lord Halifax. Also "to Entick *v.* Carrington (19 Howell's State "Trials, 1029), and Boyd *v.* U. S. (116 U. S.,

"616). These cases contain the reasoning "and conclusions upon this question of the "greatest courts of the English speaking "nations. * * *

"It is generally considered immaterial how "a paper passes into the possession of one "offering it in evidence, BUT THIS RULE IS "SUBJECT TO ANOTHER RULE WHICH IS AP-"PLICABLE THAT WHEN A PARTY INVOKES "THE CONSTITUTIONAL RIGHT OF FREEDOM "FROM UNLAWFUL SEARCH AND SEIZURE, THE "COURT WILL TAKE NOTICE OF THE QUESTION "AND DETERMINE IT. * * *

"We also hold that the letter was inad-"missible under Article Ten of the Declara-"tion of Rights, which provides 'that in all "prosecutions for criminal offenses no per-"son can be compelled to give evidence "against himself,' and that this ruling is "correct is clearly manifest for the reasons "stated in Boyd *v.* U. S., hereinbefore "cited. * * *

"The seizure of a person's private papers "to be used in evidence against him *is* "*equivalent to compelling him to be a wit-*"*ness against himself*, and in a prosecution "for a crime, is within the constitutional "prohibition."

State *v.* Slamon (*supra*).

For other cases holding analogous views see

In re Jackson, 96 U. S., 727.

In re Pacific Railway Commission, 32 Fed. Rep., 241.

Hoover *v.* McChesney, 81 Fed. Rep., 472.

U. S. Wong Quong Wong, 94 Fed. Rep., 832.

The case last above cited decides the precise point.

(*D*). The Court of Appeals of New York State, however, took the position, that conceding the search and seizure were unlawful, nevertheless, the rule appled that, when engaged in trying a criminal cause, the Court will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence.

Opinion, BARTLETT, J., Record, pages 114–115.

(*a*). We must concede that the cases cited in the opinion of the Court of Appeals, and other decisions referred to by the learned District Attorney in his Brief before that Court, are authority for the proposition, as stated by JUSTICE BARTLETT, that "the "Court, when engaged in trying a criminal cause, "will not take notice of the manner in which wit- "nesses have possessed themselves of papers or "other articles of personal property, which are "material and properly offered in evidence." But, when examined, it will be found that the leading cases on that proposition do not hold that when, by the introduction in evidence of papers illegally seized, IT IS CLAIMED THAT THE PARTY'S CONSTITUTIONAL RIGHTS WILL BE VIOLATED, the Court will not examine into the question for the purpose of ascertaining whether the objection be well founded.

We do not contend that where papers are in themselves competent and material evidence, *and their introduction violates no constitutional right*, the fact that the possession of such papers has been obtained illegally will prevent their reception in evidence. In such cases, as stated in the decisions, the party aggrieved will find his remedy by suit against the person illegally obtaining possession thereof.

BUT WE DO CONTEND THAT WHERE A PERSON IS ACCUSED OF CRIME, AND COULD NOT HIMSELF BE COMPELLED TO PRODUCE HIS PRIVATE PAPERS AND BOOKS AS EVIDENCE AGAINST HIMSELF, EITHER BY SUBPŒNA OR OTHER LEGAL PROCESS, THEN THE FACT THAT HE HAS BEEN DIVESTED OF HIS POSSESSION WRONGFULLY AND UNLAWFULLY, DOES NOT PREVENT HIM FROM URGING THE PROTECTION AFFORDED BY THE CONSTITUTIONAL PROVISION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

It is true that some of the cases, following the rule laid down in the leading cases on the question, do in effect hold that even where constitutional rights are claimed to have been violated, the Court will not inquire into the manner of procuring the evidence, but an analysis of those cases shows that the Court did not keep in mind the distinction between an *unlawful possession*, without color of right, the remedy for which would be trespass or other appropriate action, and an *unlawful use in contravention of constitutional provisions*. The distinguishing feature between the two classes of cases is, in one the single question is "unlawful possession," in the other it is "unlawful use," coupled with "unlawful possession." The decisions have confounded the two classes of cases, and held the rules laid down in the first class applicable to the second class.

(*b*). Before proceeding to analyze the cases relied upon by the State Courts, it will be well to consider the effect of the doctrine laid down by the Court of Appeals, upon the efficacy of the constitutional provisions.

If the views of that learned Court be upheld, then the protection afforded by the Constitution is more chimerical than real; for the protection against *unreasonable* searches and seizures *becomes merely a question of superior physical force.*

In other words, if a raiding party be sufficiently strong to break down a man's doors, and ransack

his drawers, and seize his private papers and documents, the constitutional provisions afford him no protection.

But such a construction would be a reproach to the Constitution and to the courts charged with the enforcement of its provisions.

Concerning the rights of Englishmen, Lord Chatham, in his speech on General Warrants declared:

> "The poorest man may, in his cottage,
> "bid defiance to all the forces of the Crown.
> "It may be frail; its roof may shake; the
> "wind may blow through it; the storm may
> "enter; the rain may enter; but the King of
> "England may not enter; all his force dares
> "not cross the threshold of the ruined tene-
> "ment."

Are the rights of an American citizen, under the Constitution, less than those of an Englishman under Magna Charta and the common law, or are the courts of this country less sensitive to the enforcement of those rights?

Suppose that a person accused of crime and in custody should make, in his own handwriting, a confession of his guilt, and that upon his trial it was offered in evidence against him, could it not be shown that the confession was not a voluntary one, but extorted from the prisoner, either through fear or by hope of reward? Would the Court not listen to the prisoner's plea as to the illegal means used to obtain the confession? Or, suppose that the prisoner making the confession was indicted for an offense in which the question of his handwriting was a material fact to be proved, could the confession be used as a standard of comparison with which to compare other handwriting alleged to be his? Would not such acts be within the meaning of the constitutional provisions? We cannot doubt the answer of this Court to

these questions. But would such a proceeding be a greater violation of a prisoner's constitutional rights than the procedure adopted in the case at bar?

(c). As to the cases cited by the learned Court below, we confidently assert that none of them decides the precise question now presented, but they were all cases where the evidence offered was either part of the *res gestæ* of the offenses sought to be proved, or in their nature contraband, and for that reason not entitled to be exempt from search and seizure.

They are all exemplifications of the general rule stated in COOLEY'S CONSTITUTIONAL LIMITATIONS, enumerating the special class of cases in which the right of seizure under a search warrant is allowed, viz., stolen goods, goods smuggled into the country in violation of the revenue laws, implements of gambling and counterfeiting, lottery tickets, prohibited liquors kept for sale contrary to law, obscene books or papers kept for sale or circulation, and powder or other explosive or dangerous material so kept as to endanger the public safety.

After enumerating these special instances the learned author states:

> "A statute which would permit the breaking and entering a man's house, and the examination of books and papers, with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the Legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters and papers exposed to prying curiosity,

"and to the misconstructions of ignorant "and suspicious persons, and all this under "the direction of a mere ministerial officer, "who brings with him such assistants as he "pleases, and who will select them more "often with reference to physical strength "and courage than to their sensitive regard "to the rights and feelings of others. To "incline against the enactment of such laws "is to incline to the side of safety. In "principle they are objectionable; in the "mode of execution they are necessarily "odious, and they tend to invite abuse and "to cover the commission of crime. We "think it would generally be safe for the "Legislature to regard all those searches "and seizures 'unreasonable' which have "hitherto been unknown to the law, and on "that account to abstain from authorizing "them, leaving parties and the public to the "accustomed remedies."

Cooley's Constitutional Limitations (6th Ed.), pages 370-372.

But to return to the cases relied upon by the Court below. It will readily be seen that they come within the special class of cases mentioned by JUDGE COOLEY.

In GINDRAT *v.* THE PEOPLE (138 Ill., 103) the prosecution was for larceny of a diamond ring. The evidence showed that the defendants examined some rings in a jewelry store, but left without purchasing. Subsequently a diamond ring was found missing from the tray and a cheap imitation ring was found in its place. The defendants were arrested and the stolen ring was found near where they were taken into custody.

In a valise in their room a detective *found other similar imitation diamond rings*, which the Court admitted in evidence against the defendants' objec-

tion. These imitation diamond rings were clearly implements of crime, and in their nature contraband. They could not reasonably be held to be within the protection of the constitutional provision.

In COMMONWEALTH *v.* TIBBETS (157 Mass., 519) the defendant, a woman, was indicted and tried for the crime of an attempt to procure an abortion, and upon the trial *certain instruments, namely, a vaginal speculum, a glass syringe, a steel needle and a tin quart measure were offered and received in evidence against her.* These instruments, shown by competent testimony to be well adapted to the production of an abortion, were taken by one Tower, a police officer, from the defendant's house at a time when he went there with a search warrant calling for a search for intoxicating liquors in the premises of the defendant's husband, and on the same trial one Ashport, another police officer, produced two letters, which were also received in evidence, *as tending to connect the defendant with the commission of the crime charged*, though this officer also testified that he took the letters at a time when he was searching the premises of the defendant's husband for intoxicating liquors.

In that case the articles and the letters were really part of the res gestæ.

In STATE *v.* VAN TASSEL (103 Iowa, 6) the dedendant was tried for murdering his wife by poisoning.

Upon the trial a bond and certain letters containing his signature were offered in evidence. The defendant, who had taken the stand in his own behalf, on cross-examination, admitted the genuineness of the signatures, but objected to the admission of the papers in evidence on the ground that they had been surreptitiously taken from his possession. The letters, it appeared, were taken from a bureau which the defendant had moved, with its contents, to the house of his deceased

wife's parents, and which he had directed his mother-in-law to give to his little child. The bond was found in the house of the defendant's father-in-law, and in neither case were the papers under lock and key.

For these reasons the Court held that the papers were not taken surreptitiously and against the will of the defendant, and for that reason that there had been no unreasonable seizure within the meaning of the constitutional provision.

In CHASTANAY *v.* THE STATE (83 Alabama, 29) the defendant was tried for carrying *concealed weapons.* When he was arrested his pockets were searched and the pistol in question was found and seized. The pistol was, of course, in its nature, contraband.

In STATE *v.* FLYNN (36 New Hampshire, 64) the defendant was accused of a violation of the liquor law. That case did not involve in any way a question of unreasonable searches and seizures of private papers, but simply a question *as to the admissibility of the testimony of witnesses, as to what they had discovered during a search of the premises in which the liquor had been found.*

In WILLIAMS *v.* THE STATE (100 Ga., 511) the defendant was on trial for keeping open a tippling house on Sunday. Two officers went to her premises, took a purse from her apron pocket, examined the premises, and found there certain wines and whiskeys. On the trial the property so found was offered and received in evidence. *These articles clearly were in their nature contraband.*

In STATE *v.* ATKINSON (40 South Carolina, 363) the defendant was indicted for murder.

On the trial pieces of newspaper which had been found in the room occupied by the defendant, and which corresponded with pieces of newspaper picked up at the scene of the murder, supposed, from the stains upon it of blood and brains, to have been the wadding of the gun with which the shot

was fired, inasmuch as the printing on these papers indicated that they were taken from the same newspaper, were received in evidence against the defendant's objection.

These pieces of paper were in their nature incriminatory and of the same class as burglar's tools or other implements used in the commission of crime and shown by the other evidence to be part of the *res gestæ*.

In STATE *v.* KAUB (15 Missouri Appeals, 433) the indictment was for lottery, and the papers offered and received in evidence were *circulars and lottery tickets*.

In the opinion of the Court they were put in the same class as forged notes and burglar's tools, and it was upon the ground of their incriminatory character that they were admitted in evidence.

Coming down to the decisions in New York State, we find that the cases of RULOFF *v.* THE PEOPLE (45 N. Y., 213), PEOPLE *v.* GARDNER (144 N. Y., 119), and PEOPLE *v.* VAN WORMER (175 N. Y., 188), are cited and relied upon.

In the RULOFF case the defendant, in company with two other men, attempted burglary in the City of Binghamton, and while so doing one of the occupants of the premises was killed. Certain burglars' tools were found near the scene of the burglary and certain articles were found upon the bodies of two of the burglars who had been drowned in an attempt to escape, which tended to connect them with the defendant, and hence connect the defendant with the commission of the crime. Detectives visited his rooms in New York City, and they found certain burglars' tools, together with certain papers and articles in a desk, tending to fasten upon the defendant the occupancy and control of the room.

It does not appear in the report of the case as to just what the nature of the papers offered in evidence were, nor does it appear that any objection

was taken to the papers on the ground of their having been unreasonably procured. That decision, we respectfully submit, can in no sense be held as upholding the People's contention in the case at bar.

In PEOPLE *v.* GARDNER (*supra*), the defendant was compelled to stand up and was then identified by a witness as the individual he had seen upon an occasion having a material bearing upon the case.

There was no question in that case of unreasonable search and seizure; and it was held that being compelled to stand up simply for the purpose of identification was not compelling him to give evidence against himself.

In PEOPLE *v.* VAN WORMER (*supra*), after the arrest of the defendants their shoes were taken from them and placed in footmarks leading to the house of the deceased made in newly-fallen snow on the night of the murder.

Upon the authority of the decision in the GARDNER case (*supra*) the Court of Appeals held that the reception of the evidence was not a violation of the defendant's constitutional rights.

From this analysis of the cases it clearly appears that none of them is applicable to the case at bar, as they all concern articles or papers either a part of the *res gestæ* of the offense sought to be proved or in their nature contraband; and for that reason the State was entitled to their possession.

While the expressions in some of the opinions are broad enough to cover this case, we submit, to that extent at least, they must be held to be erroneous.

(*d*). The protection of the constitutional provision must be held then, we submit, to be directed, not only against the unlawful seizure, BUT AGAINST THE UNLAWFUL USE AFTER SEIZURE.

The question in every case is: Has the defendant waived or forfeited his constitutional right of protection?

If not, the fact of custody is immaterial.

If a statute had authorized the things to be done that were done, we cannot doubt but that it would be held to be absolutely unconstitutional and void.

Yet it must be remembered that a trial and conviction *in an unconstitutional way is as violative of a defendant's constitutional rights as a trial and conviction under an unconstitutional law.*

Ex parte Neilsen, 131 U. S., 176.

Point III.

The statute, Sections 344a and 344b, under which the indictment was found and the conviction was had, are unconstitutional and void in that thereby the defendant has been deprived of his liberty and property without due process of law, and has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution.

First.—This point also, as a Federal question, was presented to and considered by the Court of Appeals of the State of New York on appeal from the judgment rendered.

In the opinion written, the precise point now urged is stated:

> "The next point argued by the appellant's
> " counsel is, that Sections 344a and 344b of
> " the Penal Code, under which the indict-
> " ment was found and the conviction had,
> " are unconstitutional and void, for the
> " reason that the defendant has been de-
> " prived of his liberty and property without

" due process of law, in violation of both the " Federal and State Constitutions."

See Opinion, BARTLETT, J., Record, page 116.

The learned Judge then called attention to the fact that no exception was taken to the charge of the Court respecting the application and limitations of the statute, but as the Court considered it a question of public importance, they disregarded the alleged waiver and considered the merits.

See Opinion, BARTLETT, J., Record, page 117.

In view of the fact that the State Court overlooked the absence of an exception, and proceeded to consider the question as if properly raised, we submit their action is sufficient warrant for the review by this Court in any event.

But as we read the decisions, the presence of an exception is immaterial.

If a person has been deprived of his liberty, *without due process of law*, an exception is not necessary to raise that question before an appellate court; nor can a party charged with crime by any act of his waive his right to a trial in the way provided by law.

Among many decisions we refer to the following:

Hopt *v.* Utah, 110 U. S., 574.
Thompson *v.* Utah, 170 U. S., 343.
Cancemi *v.* The People, 10 N. Y., 128.
Maurer *v.* The People, 43 N. Y., 1.
Messner *v.* The People, 45 N. Y., 1.
People *v.* Bradner, 107 N. Y., 1.
Matter of Langslow, 167 N. Y., 314.

In THOMPSON *v.* UTAH (*supra*) this Court, speaking by MR. JUSTICE HARLAN, said:

"It is said that accused did not object, until after verdict, to a trial jury composed of "eight persons, and therefore he should not "be heard to say that his trial by such a jury "was in violation of his constitutional rights. "It is sufficient to say that it was not in the "power of one accused of felony, by consent "expressly given or by his silence, to authorize a jury of only eight persons to pass "upon the question of his guilt. The law in "force when this crime was committed did "not permit any tribunal to deprive him of "his liberty, except one constituted of a "jury of twelve persons.

* * * * * *

"If one under trial for a felony, the punishment of which is confinement in a penitentiary, could not legally consent that the "trial proceed in his absence, still less could "he assent to be deprived of his liberty by a "tribunal not authorized to determine his "guilt."

Thompson *v.* Utah (*supra*).

In PEOPLE *v.* BRADNER (*supra*) the rule is stated thus:

"If the record discloses upon its face that "the Court had no jurisdiction, or that the "constitutional method of trial by jury was "disregarded (Cancemi's case, 18 N. Y., 128), "or some other defect in the proceedings, "which could not be waived or cured and is "fundamental, it would, as we conceive, be "the duty of an appellate tribunal to reverse "the proceedings and conviction, although "the question had not been formally raised "in the court below, and was not presented "by any ruling or exception on the trial."

People *v.* Bradner (*supra*).

In view of the rule stated in these decisions, and in view of the fact that the State Court considered and passed upon the questions now sought to be reviewed, the absence of an exception in the record, we *submit, is immaterial.*

Second.—THE STATUTE (SECTION 344A) IS AN ARBITRARY EXERCISE OF POWER, BECAUSE IT MAKES THE POSSESSION OF ARTICLES OF A NATURE SIMILAR TO OTHERS IN UNIVERSAL USE AND IN THEMSELVES HARMLESS AND INCAPABLE OF INJURY TO OTHERS A CRIMINAL OFFENSE.

(*a*). The provisions of Section 344a, in so far as they are material to the discussion under this point, are to the following effect:

> "A person * * * *who shall have in "his possession knowingly any writing, "paper or document representing or being a "record of any chance, share or interest in "numbers sold, drawn or to be drawn in "what is commonly called policy,* * * * or "any paper, drawing, writing, numbers, de-"vice, policy slip, or article of any kind such "as is commonly used in carrying on, pro-"moting or playing the game commonly called "policy,* * * * is a common gambler "and punishable by imprisonment for not "more than two years, and in the discretion "of the Court by a fine not exceeding $1,000, "or both."

See Penal Code, Sec. 344a.

(*b*). The arbitrary character of the statute becomes apparent when we consider the method of playing the game of policy and the nature of the articles or implements used therein.

By the testimony adduced, it was shown that the game is conducted in the following way: A person desiring to play goes to a shop where the game is

being carried on, and the keeper of the shop, the person backing the game, writes down on carbon alternate sheets the numbers which this person plays or bids on; for instance, 4–11–44. This combination is called a "gig," and the alternate sheets are what are known as "manifold sheets." A piece of paper or ticket with the combination played by the person entering the game is handed to him, and this is known as a "policy slip," Drawings are held usually twice a day; the successful combinations are then announced and the persons playing the successful combinations receive their money.

After this drawing both the "manifold sheets" and the "policy-slips" become entirely worthless so far as any future participation in the game is concerned. They then become simply pieces of paper with combinations of figures written upon them.

NEITHER THE "SLIPS" NOR THE "SHEETS" CAN EVER AGAIN BE USED IN CONNECTION WITH THE GAME OF POLICY.

We take it that no one would contend for a moment that the legislature could make the possession of harmless pieces of paper, whether with or without combinations of figures written upon them, a crime. *Such articles by themselves are commercial commodities in universal use.* Nevertheless the statute under discussion is broad enough to make *the possession of a harmless piece of paper by a person having no criminal intent*, a felony, punishable by fine and imprisonment in the penitentiary; and in addition, to brand the person in whose possession such paper is found *a common gambler*. In fact, so far as the present case is concerned, it was entirely upon the alleged possession of manifold sheets *relating to games already played and without proof of criminal intent or criminal use by him* that the defendant was convicted.

The statute then, we submit, is wholly arbitrary, because it makes an entirely innocent act a highly

penal offense. This, we submit, the Legislature has not the power to do.

People *v.* Gillson, 109 N. Y., 389.
Matter of Jacobs, 98 N. Y., 98.
People *v.* Marx, 99 N. Y., 377.
People *v.* Arensberg, 103 N. Y., 388.
Forster *v.* Scott, 136 N. Y., 577.

In PEOPLE *v.* GILLSON (*supra*) the provision of the Penal Code of the State of New York, prohibiting the sale or disposal of any article of food or any offer or attempt to do so upon any representation or endorsement that anything else would be delivered as a gift, prize, premium or reward to the purchaser, was held to be in violation of the constitutional provision giving to every person liberty and property unless he is deprived thereof by due process of law.

In the opinion, which was written by MR. JUSTICE PECKHAM, now of this Court, as to the right of arbitrary interference by the Legislature with the rights of the citizen, it was said:

> "But there is a limit to such interference
> "in my judgment, and there does come a
> "time when the constitutional provision, so
> "often herein quoted, steps in to protect the
> "citizen.
>
> "As an act in furtherance of the public
> "health or morals, no one at this period of
> "the history of man would, I think, regard
> "it as legal to enact in this State (changing
> "the verbiage to suit the altered condition of
> "the race in this country) that no man or
> "woman under the rank specified in the law
> "should thereafter wear fur on his or her
> "clothes, or that no knight under the degree
> "of a lord should wear shoes or boots having
> "pikes in them more than two inches long.
> "* * * *Nor can this act stand as a valid*

" *exercise of legislative power to enact what*
" *shall amount to a crime.* The power of the
" legislature to so declare is exceedingly
" large, and it is difficult to define its exact
" limit. But that there is a limit even to that
" power under our Constitution, we entertain
" no doubt, and we think that limit has been
" reached and passed in the act under review.

" The power has been unlawfully exercised
" in this instance for the same reasons that
" we have already stated, because it violates
" the constitutional provision which secures
" to each person in this State his liberty and
" property, except as he shall be deprived
" of one or both by due process of law."

People *v.* Gillson (*supra*).

So in the case at bar, we submit, the legislative power to enact *what shall amount to a crime* has been exceeded in the statute under discussion, as it makes an entirely innocent act a criminal offense and unjustly deprives a person accused of his liberty without due process of law.

Third.—NOT ONLY IS THE STATUTE, SECTION 344A, UNCONSTITUTIONAL, BUT SECTION 344B, PRESCRIBING WHAT SHALL BE PRESUMPTIVE EVIDENCE OF POSSESSION KNOWINGLY UNDER SECTION 344B, IS ALSO UNCONSTITUTIONAL.

(*a*). In connection with and in explanation of Section 344a above quoted, it is prescribed by Section 344b that

" *The possession by any person,* OTHER
" THAN A PUBLIC OFFICER, *of any article,*
" *paper or document, representing or being a*
" *record of any chance, share or interest in*
" *the numbers sold, drawn or to be drawn in*
" *what is commonly called policy, or in the*
" *nature of a bet, wager, or insurance upon*

"*the drawing or drawn numbers of any*
"*public or private lottery, or any paper*
"*print, writing, numbers or device, policy,*
"*slip or article of any kind such as is com-*
"*monly used in carrying on, promoting or*
"*playing the game commonly called policy*
"IS PRESUMPTIVE EVIDENCE OF POSSESSION
"THEREOF, KNOWINGLY AND IN VIOLATION OF
"THE PROVISIONS OF SECTION 344a.

See Penal Code, Sec. 344b.

(*b*). We contended before the State Court that the two sections referred to, being part of one enactment, should be read together, but with our contention the learned Court said that it was unable to agree.

In its view "Section 344a creates the crime of
" which the defendant stands convicted; it is com-
" plete in itself and is in no way dependent upon
" the provisions of Section 344b. The latter ob-
" jection establishes a rule of evidence only."

People *v.* Adams, Opinion BARTLETT, J., Record, page 116.

We do not, however, deem the point of very great importance, because even conceding that the statutes must be construed separately, nevertheless the trial and conviction in the case at bar was had under both of the Sections; and although the offense and punishment were embraced wholly within Section 344a, the conviction of the defendant of that offense and the imposition of the punishment were brought about under and by virtue of the provisions of Section 344b.

That it was wholly by virtue of the provisions of Section 344b that he was found guilty, clearly appears from the proceedings upon the trial. The jury, after being out nearly four hours, returned with the statement that they could not

agree. After being further instructed by the Court, they returned to their deliberations, and again, after nearly seven hours, returned for further instructions as to whether they were to understand that proof of simple possession of policy slips was presumptive evidence of possession thereof knowingly, and upon this point the Court said:

> "That is precisely the language that the "Code provides shall be presumptive evi- "dence of possession knowingly. If you "find that a man or this defendant had in "his possession these papers, which were "policy slips used in the game of policy, "that mere fact of possession by him is "presumptive notice under the statute that "he held them, and had possession of them "knowingly."

See Record, page 92.

This language is, in effect, a practical direction of a verdict against the defendant.

And it is clear, we submit, that the jury relied entirely upon the presumption created by the statute as evidence sufficient to convict. In fact there was absolutely no other proof than the mere fact of possession to connect the defendant with the offense.

Therefore, even though, Section 344a, standing by itself, be held to be constitutional, if 344b be unconstitutional, the defendant has just cause for complaint.

(*c*). THE ARTIFICIAL PRESUMPTION OF GUILT CREATED BY SECTION 344b TAKES AWAY FROM A PERSON ACCUSED HIS RIGHT TO BE PRESUMED INNOCENT UNTIL HE IS PROVED TO BE GUILTY, AND DEPRIVES HIM OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

1st. Under the provisions of Section 344b, after the mere fact of possession is shown, without proof of any criminal intent on the part of the person in whose possession the articles are found, and without proof that he had used, or intended to use, such articles in connection with, or in playing the game of policy, the prosecution may rest. Thereupon, the presumption of guilt attaches to the accused, and the burden of proof is shifted to him to prove his innocence; otherwise upon the mere proof of possession, it is the duty of the jury under the legislative mandate to convict.

The jury thus is not made the triers of fact as to the guilt of the accused, but in the absence of other evidence, triers simply of the *single fact of possession*, and which fact, when found, the Legislature itself has declared is presumptive evidence of guilt.

This then is not a case where the Legislature has simply prescribed *a rule of evidence*, but where it has itself assumed the right to pass upon the guilt or innocence of a party accused, and to say what the jury shall consider *not mere evidence of the offense*, BUT PRESUMPTIVE EVIDENCE OF GUILT.

The language of the statute is that possession "is PRESUMPTIVE EVIDENCE *of possession thereof knowingly and in violation of the provisions of Section 344a.*"

See Penal Code, Sec. 344b.

2d. The Appellate Division in the First Department, in the case of PEOPLE *ex rel.* WILSON *v.* FLYNN (72 App. Div., 67), construed Section 344a to mean that before the offense is committed it must be made to appear that the articles were in use in connection with a place used for doing the prohibited acts, and *that the use of these articles, disconnected from their use in playing the game*, is not made an offense under the provisions of that section.

Conceding this to be the true construction of the statute, then the violence of the presumption is

apparent, because if a person in no way connected with the game should find one of these pieces of paper in the street and pick it up simply from curiosity, and it should subsequently be found in his possession, he could be tried and convicted without any other evidence of the offense prescribed by Section 344a; or if he should simply make a copy of a "policy slip," or a "manifold sheet," to gratify some mere personal whim, without any intention of playing the game, the mere possession of that harmless bit of paper, neither representing a chance in the game, or capable of being used therein, would be sufficient to convict him of the crime of having in his possession a paper *of a kind* used in playing or carrying on the game, and under the statute he would be, on conviction, a common gambler.

The presumption of guilt created by the statute thus eliminates all question of *criminal intent*, which, it would seem, is a necessary ingredient of the offense under Section 344a.

U. S. *v.* Carll, 105 U. S., 611.

Take another instance: The game of policy is not confined to the State of New York, but is played in every State of the Union as well as in foreign countries. If, however, any articles relating to a game played or to be played in London or Paris, or in Philadelphia or Boston, and sold in those places, should be found in the possession of a person in the State of New York, the mere fact of possession, *though the game was not played nor to be played there, nor though the articles were not sold there*, would be PRESUMPTIVE EVIDENCE that such articles had been used, or were intended to be used, in a game in New York State, and in violation of the laws of that State. But as we have shown, "policy slips" or "manifold sheets" can only be used *in connection with the game to which they relate*. For all other purposes they are harmless pieces of paper.

THUS AN ACT WHICH IS NOT AN OFFENSE AGAINST THE NEW YORK LAWS, NOR PUNISHABLE BY THE NEW YORK LAWS, IS MADE PRESUMPTIVE EVIDENCE OF AN OFFENSE AGAINST AND PUNISHABLE BY SUCH LAWS.

These illustrations show that an act entirely innocent in itself, and having no relation to the offense, under Section 344a, is made presumptive and sufficient evidence of guilt under Section 344b.

In the reign of Henry VIII the Countess of Salisbury had become obnoxious to him on account of her son, Cardinal Pole. Charges were made against her, but they could not be sufficiently proved, and the King determined to procure her destruction in a summary way. Being advised by his judges that if a person was attainted, the attainder could never afterwards be brought into question, a bill was brought into the House of Lords to attaint her of treason. The only thing like proof before the Parliament was that Cromwell showed to the House a banner, on one side of which were embroidered the five wounds of Christ, the symbol chosen by the Northern rebels; on the other side the Arms of England, which banner he said was found in the house of the Countess.

This was considered as sufficient evidence of her approving that rebellion.

Reeves' Hist., Vol. IV, page 555.

The presumption created by the statute under consideration is quite as arbitrary and absurd.

3d. While in an action of a civil nature, and to some extent, even in criminal prosecutions, the Legislature may prescribe what *shall be evidence* against the accused; yet, where the Legislature arrogates to itself the right to pass upon the *sufficiency of such evidence*, and to declare that, in the absence of other evidence, a certain proved fact shall be

deemed sufficient evidence of guilt, such an act is, we submit, wholly beyond their power.

We have express authority for this statement by a decision of the Supreme Court of Rhode Island, and also one by the Court of Appeals of the State of New York.

State *v.* Beswick (13 R. I., 211).
Wynehamer *v.* The People (13 N. Y., 378).

In the Rhode Island case the Legislature of that State passed a law in regard to the sale of liquors, to the effect that it should not be necessary to prove an actual sale, but "that the notorious character "of any such premises, or the notoriously bad or "intemperate character of persons frequenting the "the same, or the keeping of the implements or "appurtenances usually appertaining to grog shops, "distilling place or places where such liquors are "sold, shall be *prima facie* evidence that said liquors "are kept on said premises for the purpose of sale "within this State."

It was held that this statute was unconstitutional and void and deprived a person accused of the offenses therein enumerated of his liberty without due process of law.

The opinion states:

> "The State submitted in support of the "complaint, besides other evidence, evidence "to show that the place kept by the defend- "ant had the reputation of being a grog "shop; that it was frequented by men of "intemperate habits, and that the imple- "ments and appurtenances were there which "are usually to be found in a grog shop. "The defendant offered no testimony, but "requested the Court in effect to instruct the "jury that they could not find him guilty "unless they were convinced of his guilt

" beyond a reasonable doubt, and that tes-
" timony of the kind above recited would
" not of itself be sufficient to warrant a con-
" viction.

" The Court did not comply with these
" requests, but instructed the jury as fol-
" lows, to wit: *Prima facie* evidence is that
" which appears to be sufficient proof respect-
" ing the matter in question until something
" appears to controvert it; but which may
" be contradicted, rebutted or explained.
" *Prima facie* evidence is sufficient to estab-
" lish the fact unless rebutted; hence if the
" character of the place as one notorious for
" the sale of liquors, or if the fact that the
" usual implements and appurtenances were
" kept there are proved to your satisfaction,
" that is sufficient to convict if not rebutted."

" The defendant excepted both to the
" charge and to the refusals to charge. It
" will be observed that the statute makes
" proof of the facts mentioned in it, not
" only evidence against the accused, but
" *prima facie evidence of his guilt, so that*
" *upon proof of them it is not only the*
" *right but the duty of the jury to convict*,
" unless the presumption is rebutted by other
" evidence, though, of course, such other
" evidence may be elicited from the witnesses
" for the State, as well as given by the wit-
" nesses for the defendant.

" The question then is, whether the statute
" is constitutional which makes it the duty
" of a jury empanelled to try a complaint
" for unlawfully keeping liquors for sale
" to convict the accused upon simple proof
" that his place of business is notorious as a
" place where liquors are unlawfully kept for
" sale or upon simple proof that the place is
" frequented by persons of notoriously bad
" or intemperate character, or upon proof

" that he has there the implements and ap-
" purtenances of a grog shop or distilling
" shop without more, unless there be other
" evidence to rebut or control it. We have
" very carefully considered the question, and
" have come to the conclusion that the stat-
" ute is not constitutional. It virtually
" strips the accused of the protection of the
" common-law maxim, that every person is
" to be presumed innocent until he is proved
" guilty, *which is recognized in the Constitu-*
" *tion as a fundamental principle of juris-*
" *prudence*, and we think it is repugnant to
" the constitutional provision that the ac-
" cused shall not be deprived of life, liberty
" or property unless by the judgment of his
" peers or the law of the land. What is
" meant by the judgment of his peers is the
" judgment of a jury, and certainly the
" accused does not have the judgment of a
" jury if the jury is compelled by an artificial
" rule to convict him, whether they think
" him guilty or not, upon proof of a fact
" which is consistent with his innocence, and
" which is so consistent with his innocence
" that proof of it at common law would not
" even be admissible against him. Suppose
" that the general assembly were to enact
" that if any person were generally reputed
" to be guilty of a murder, it should be *prima*
" *facie* evidence that he was guilty, and that
" some citizens were convicted and sentenced
" to death or imprisonment on such evidence
" because in the absence of rebutting evi-
" dence the jury had no option to acquit him.
" Could it be said that his life or liberty had
" been taken from him by the judgment of
" his peers? We think not. The judgment
" of the jury would not have been taken or
" the question of his guilt, but only on the
" question whether or not he was generally

" reputed guilty. So under the statute here " a man may be convicted of unlawfully " keeping intoxicating liquors for sale upon " proof that his place of business is generally " reputed to be a liquor shop without the " jury actually passing any judgment on the " question of his guilt.

" The provision is that the accused shall " not be deprived of his life, liberty or prop- " erty, unless by the judgment of his peers " or the law of the land. It may be argued " that even if the accused does not have the " judgment of his peers, he is, nevertheless, " convicted by the law of the land. This " phrase has a historical origin. It was bor- " rowed from Magna Charta and as has been " repeatedly decided, means the same as due " process of law. The question is whether if " a man is convicted on the testimony indi- " cated, and under the rule prescribed by the " statute, he is convicted according to due " process of law. The answer to the ques- " tion depends on the meaning of the phrases " 'due process of law' and the 'law of the " land.' The phrases have never received a " perfectly satisfactory definition. One or " the other of them occurs in all, or nearly " all, the constitutions of the several states " and in the Constitution of the United " States, and it is well settled that the pro- " visions in which they occur are intended " to operate as limitations on the legislative " power of the several states and of the " United States. It follows if the provision " is a limitation on the legislative power that " a legislative enactment is not necessarily " the law of the land, even when it does not " conflict with any other provision of the " the Constitution, and that a proceeding " according to a legislative enactment is not " necessarily due process of law.

"It is also settled that these provisions " secure to every citizen, except in the mat- " ter of taxation, a judicial trial, and before " he can be deprived of life, liberty or prop- " erty.

"The definition of due process of law given " by Judge Edwards in Westervelt *v.* Gregg " (12 N. Y., 202), is quoted by Judge Cooley " in his work on constitutional limitations, " 355, with approval, and is, in our opinion, " not only concise, but very accurate. Due " process of law undoubtedly means, he " says, 'in the due course of legal proceed- " ings according to those rules and forms " which have been established for the pro- " tection of private rights.' The effect in " criminal prosecutions is to secure to the ac- " cused, before condemnation, a judicial trial.

"If not strictly in all points according to " the common law, at least, not in violation " of those fundamental rules and principles " which have been established at common " law for the protection of the subject or the " citizen. Among these rules there is none " which is more fundamental than the rule " that every person shall be presumed inno- " cent until he is proved guilty. 'The rule,' " said Judge Selden in the People *v.* Toyn- " bee (2 Parker's Criminal Cases 490), "will be " found specifically incorporated into many " of our State Constitutions, and is one of " those rules which in our Constitution are " compressed into the brief, but significant " phrase "due process of law."' Indeed to " hold that a legislature can create artificial " presumptions of guilt from facts which are " not only consistent with innocence, but " which are not even a constituent part of " the crime when committed, is to hold that " it has the power to take away from a ju- " dicial trial, or at least substantial rights in

" it, the very elements which make it judi-
" cial. To hold so is to hold that the legisla-
" ture has powers to bind and circumscribe
" the judgments of courts and juries in mat-
" ters of fact and in an important measure
" to predetermine their decisions and ver-
" dicts for them. It is true, the accused has
" the right of defense left to him and may,
" if he can, adduce satisfactory evidence,
" rebut statutory presumptions; but the pro
" duction of such evidence is not always easy,
" even with the right to testify in his own
" behalf; *and the right to testify in his own
" behalf having been granted, can be abrogated
" by the Legislature.* It is not one of those
" great and immemorial rights which lie im-
" bedded in the phrase 'the law of the
" land.'"

State *v.* Beswick, 13 R. I., 211.

Similar views were expressed in a subsequent decision in that State in

State *v.* Kartz, 13 R. I., 528.

In the State of New York an act to prevent intemperance (Laws of 1855, page 340), one of the provisions of which was to the effect that "upon the trial of any complaint commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale," was held to be unconstitutional and void.

As to the validity of this provision SELDEN J. said:

" Precisely how far the Legislature may go,
" in changing the modes and forms of judi-
" cial proceeding, I shall not attempt to de-
" fine; but I have no hesitation in saying

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" *that they cannot subvert that fundamental*
" *rule of justice which holds that every man*
" *shall be presumed innocent until he is*
" *proved guilty.* This rule will be found
" specifically incorporated into many of our
" State Constitutions, and is one of those
" rules which, in our Constitution, are com-
" pressed into the brief but significant phrase,
" 'due process of law.' "

" Can Section 17 be reconciled with this
" rule?

" It provides that, upon every prosecution
" under the act, proof of a sale of liquor
" shall sustain an averment of an unlawful
" sale, and proof of delivery shall be *prima*
" *facie* evidence of a sale. It is plain that at
" common law the legal presumption would
" be directly the reverse of that declared by
" the act. Where the common law would
" presume innocence, this act presumes guilt.
" Either the guarantee of a judicial trial, ac-
" cording to the course of the common law,
" is a nullity, or this provision is void. But
" I am prepared to go further, and to hold
" that all those fundamental rules of evi-
" dence, which in England and in this coun-
" try have been generally deemed essential
" to the due administration of justice, and
" which have been acted upon and enforced
" by every court of common law for cen-
" turies, are placed by the Constitution be-
" yond the reach of legislation. They are but
" the rules which reason applies to the in-
" vestigation of truth, and are, of course, in
" their nature unchangeable. If it does not
" follow that to determine what they are, as
" applicable to judicial proceedings, is a judi-
" cial and not a legislative power still they
" must necessarily be included in the phrase,
" 'due process of law.' If this be not the
" true interpretation of the Constitution; if

"the Legislature, in addition to declaring
"what acts and what intentions shall be
"criminal, can also dictate to courts and
"juries the evidence, and change the legal
"presumptions upon which they shall con-
"vict or acquit, there is no barrier to legisla-
"tive despotism; and the separation of the
"legislative and judicial departments of the
"government, the guarantee of trial by jury,
"and of a trial according to the course of the
"common law, have all failed to afford any
"substantial security to individual rights."

Wynehamer *v.* The People (*supra*), pages 444–447.

These views we believe to be sound and particularly applicable to the present case.

The statute under consideration is not unlike the "Test Case" laws, and is, to all intents and purposes, a bill of pains and penalties, in which, in the words of MR. JUSTICE FIELD:

"The legislative body, in addition to its
"legitimate functions, exercises the powers
"and office of judge; it assumes, in the lan-
"guage of the text books, judicial magis-
"tracy; it pronounces upon the guilt of the
"party, without any of the forms or safe-
"guards of trial; it determines the sufficiency
"of the proofs produced, whether conform-
"able to the rules of evidence or otherwise;
"and it fixes the degree of punishment in
"accordance with its own notions of the
"enormity of the offense."

Such a bill, according to the learned Judge, is embraced within the meaning of the Constitution prohibiting the passing of laws of attainder.

Cummings *v.* Missouri, 71 U. S., 277.

See also

Green *v.* Shumway, 39 N. Y., 418.

4th. The decision referred to by JUSTICE BARTLETT, PEOPLE *v.* CANNON (139 N. Y., 32), in which the opinion was written by MR. JUSTICE PECKHAM, now of this Court, does not hold views contrary to those now contended for.

In that case a statute was held to be constitutional which made the possession by a junk dealer or dealers of second-hand articles of bottles used in the sale of soda waters and beer *prima facie* evidence of their use unlawfully.

That case, however, is very different from the statute now under consideration, as such articles were in their nature proprietary and protected by statute *against use by other persons.*

In that case possession by a person other than one whose name was branded on the bottle, was reasonable ground for the presumption that possession had been obtained unlawfully, as that mark was evidence of the proprietary character of the article and was intended *to protect the owner in his use thereof.* That case is within the class of cases where proof of possession of stolen property is held to afford a presumption that the possessor is guilty of larceny.

> Knickerbocker *v.* The People, 43 N. Y., 117.

Under such circumstances *there is a direct connection between the fact from which the presumption was to flow and the guilt of the accused.*

The same may be said of the decision in PEOPLE *v.* BUFFALO FISH COMPANY (164 N. Y., 93), which is to the effect that the possession of fish of the species prohibited by the statute shall be *prima facie* evidence of such possession in violation of law. The real question decided in that case, however, was not as to the provision making possession *prima facie* evidence, but as to interpretation and the constitutionality of the statute as a police regulation.

Fourth.—SECTION 344B IS ALSO UNCONSTITUTIONAL, BECAUSE IT DENIES TO PERSONS ACCUSED THE EQUAL PROTECTION OF THE LAWS.

By Section 344b the possession by any person, "*other than a public officer*," of any article or paper connected with the game of policy, or of a kind used in the carrying on that game, is made presumptive evidence of possession thereof knowingly in violation of Section 344a.

Thus every holder of public office, from the Governor of a State down to a person holding the office of notary public, is exempt from the presumption of guilt, which attaches to every other person in whose possession such articles are found.

Every person, *except a public officer*, when tried for the offense, must, after the simple fact of possession has been shown, rebut the presumption of guilt by offering evidence in his behalf.

A person holding a public office, however, whether the office held is such as would entitle him, in the performance of his duties, to have possession of such articles or not, is not put upon his defense, and cannot be convicted under the statute *until further proof than the mere fact of possesion is made by the prosecution.*

The reason why the simple fact of possession by a private citizen should be made *prima facie* evidence of guilt, and that fact in the case of a public officer not also be given equal weight, is not apparent.

It is a purely arbitrary distinction, we submit, having no basis in fact upon which to rest, and denies the equal protection of the laws.

Our contention in this regard was answered by the Court of Appeals in the following way:

> "The appellant, in discussing this section,
> "raised the additional point that it is class
> "legislation, for the reason that it excepts

"from its provisions public officers. It is "argued that a notary public is a public "officer, and that he might be knowingly in "possession of these papers used in the game "of policy with impunity.

"It is true, if we give a literal construction "to the language of this section that the "statement is warranted; but the rule is "that all statutes must be reasonably con- "strued, and in this case it is obvious that "the Legislature intended to except those "officers who, in the discharge of their "official duties, were necessarily, at times, "the custodian of these papers."

While, of course, we are aware that this Court will in most instances adopt the construction of a State statute made by the State Court, nevertheless, we submit, where the language of a criminal act is plain and unambiguous, there is no room for construction, and the Court is not justified in departing from the plain language of the statute in search of an intention which the words themselves do not suggest.

U. S. *v.* Wiltberger, 5 Wheaton, 76.

To quote the words of CHIEF JUSTICE MARSHALL in that case:

"*It is the Legislature, and not the Court,* "*which is to define a crime and ordain its* "*punishment.*"

The statute being highly penal, must, we submit, receive a strict construction, and the intention of the Legislature is to be gathered from the words they employ.

Giving, then, the statute the meaning which its plain words require, it is clearly class legislation,

and denies to the defendant equal protection of the laws, as it makes an act presumptive evidence of his guilt, which would not be so considered in the case of a person holding a public office being accused of a similar offense.

That such legislation is unconstitutional and void is beyond question.

Cooley's Cons. Lim. (6 Ed.), 481–483.

Point IV.

This Court should not, and will not, be influenced in its decision of the questions presented on any grounds of expediency or overruling necessity.

A ruling adverse to the views contended for would work more harm to the innocent than to the guilty. There are ample ways to prove a person charged with crime guilty of the offense without the invasion of his premises and the ransacking of his private papers, and without creating an arbitrary presumption of guilt against him.

In this connection we may well bear in mind the words of JUDGE BRONSON, in the case of MADAM RESTELL, that—

> "It is better that the guilty should some-
> "times go free than that the innocent be
> "subjected to such an ordeal. * * * *
> "In our zeal to punish crime, great care
> "should be taken not to make precedents
> "which may prove dangerous to the inno-
> "cent, and it should never be forgotten that

"even the guilty have rights which should
"be scrupulously guarded."

People *v.* Restell, 3 Hill, 289.

Point V.

The judgment should be reversed.

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